Supreme Court, U.S.
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In the Supreme Court of the United States

ARTHUR ALAN WOLK,

Petitioner,

v.

ALLIED SIGNAL, INC., HONEYWELL INTERNATIONAL, INC., UNITED STATES OF AMERICA, CARL DINWIDDE, DANIEL CAMPBELL, FRANK GATTOLIN, AND TEN UNKNOWN NTSB EMPLOYEES.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR ALAN WOLK
Pro Se Petitioner
WOLK & GENTER
1710-12 LOCUST STREET
PHILADELPHIA, PA 19103
(215) 545-4220

176 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutional tort remedy under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) exists against federal agency employees for *deprivation of the constitutional right to access the courts* when a plaintiff is forced to settle a civil suit at a severely reduced amount due to the employees' intentional efforts to damage the plaintiff's case by attempting to release to the defendant information the employees knew to be false and damaging to the plaintiff's case, in violation of the agency's own rules; particularly in light of this Court's recent decision in *Christopher v. Harbury*, 536 U.S. 403 (June 20, 2002).

2. Whether the requirement of pleading a business or property injury to establish standing in private civil actions for treble damages brought under the Racketeer Influenced and Corrupt Orgainizations Act (RICO), pursuant to 18 U.S.C. § 1964(c), is also subject to the requirement of heightened specificity beyond what is required by Rule 8 of the Federal Rules of Civil Procedure and this Court's holding in *NOW v. Scheidler*, 510 U.S. 249 (1994).

3. Whether the tort of negligent supervision is actionable against the United States, as employer, under the FTCA, when a duty to protect the plaintiff from the harmful conduct of government employees exists under state law, yet the intentional torts committed by the employees are themselves not actionable against the United States as excluded from the FTCA's waiver of sovereign immunity under 28 U.S.C. § 2680(h), a question this Court specifically left open in *Sheridan v. United States*, 487 U.S. 392, 403 n. 8 (1988).

PARTIES TO THE PROCEEDINGS BELOW

The following were parties before the United States Court of Appeal for the Third Circuit: Arthur Alan Wolk (Appellant), National Transportation Safety Board; AlliedSignal, Inc.; Honeywell International, Inc.; United States of America; Carl Dinwidde; Daniel Campell; Frank Gattolin; and Ten Unknown NTSB Employees

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported. The order denying rehearing (App., *infra*, 27a-28a) is unreported. The district court's opinion (App., *infra*, 7a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2002. Petitioner's timely filed motion for panel rehearing and rehearing en banc was denied by the court of appeals on September 30, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Relevant provisions of the Westfall Act, 28 U.S.C. § 2679 (b)(1), and the Federal Tort Claims Act (FTCA), 28 U.S. C. § 2671 *et seq.*, are reproduced at App., *infra*, 29a-34a.

STATEMENT OF THE CASE

The important federal issues arising in this case stem from a complaint filed by Arthur Alan Wolk (Wolk) against employees of the National Transportation Safety Board (NTSB), Allied Signal/Honeywell International, Inc. (Allied), and the United States based on the following course of events outlined in the complaint.

Factual Background

The events centered around the NTSB investigation into the crash of Wolk's airplane, which he was piloting at the time it crashed. App., *infra*, 23a-52a. Allied participated in the investigation of the accident to the extent of the performance of parts it had manufactured. App., *infra*,64a-66a.

The appointment of manufacturers as parties to an NTSB investigation is standard practice. App., *infra*, 78a-80a. This practice relies on the manufacturer's honest assessment of its own product in the face of a potential product liability lawsuit. App., *infra*, 79a-100a. This process is susceptible to deception and mistaken NTSB conclusions because manufacturers are potential litigants. This can threaten the overall safety of flying. App., *infra*, 79a-95a.

Wolk alleged that his outspoken criticism of the NTSB's methods and conclusions combined with his successful demonstrations that the NTSB conclusions on major airline disasters were wrong, has caused resentment toward him by many of the agency's employees. App., *infra*, 38a-41a and 93a-95a.

Wolk alleged that in the investigation of his accident Allied was deceitful regarding the performance of its product. Its findings that the product was not defective, led to an NTSB investigative report that in error, blamed the accident on Wolk himself, and contained false information about Wolk. App., *infra*, 64a-77a.

The NTSB employees published the accident report on the internet. App., *infra*, 53a-54a. When Wolk discovered this, he informed the NTSB of the errors, and upon further investigation, the NTSB confirmed that the report was incorrect and that it would be corrected. App., *infra*, 55a-56a. Despite its acknowledgement that the report was untrue, Wolk later found that the NTSB employees had republished the same report on the internet. App., *infra*, 39a-61a.

Wolk specifically alleged that the second-publishing was done intentionally by employees at the NTSB who resented his work and sought to damage his reputation as one of the most technically savvy aviation attorney's in the nation. App., *infra*, 93a-95a. It did so, by specifically attributing amateur and careless aviation mistakes to him, thus creating the false perception that he was not a genuine expert in his field. App., *infra*, 93a-97a.

During this time, Wolk was engaged in a lawsuit with Fox News over a defamatory broadcast following the accident. App., *infra*, 62a-64a. While the suit was pending, the broadcaster issued a FOIA request to the NTSB for its documents and information regarding Wolk and the accident. App., *infra*, 62a-64a. Wolk alleged that the disclosure of such a report in response to a third party's discovery request in civil litigation would violate the NTSB's rules. App., *infra*, 62a-64a. Furthermore, the NTSB had already acknowledged that the report was in error. Despite all of this, because the resentful employees desired to damage Wolk's case against the broadcaster, they sought to disclose the false report. App., *infra*, 62a-64a. Wolk expended large amounts of time, effort, and money to fight this wrongful disclosure and was finally forced to settle his case at a fraction of its value. App., *infra*, 62a-64a.

For these wrongful actions, Wolk brought several tort claims against the employees of the NTSB, Allied, and the United States. In his second amended complaint, defamation was brought against the employees of the NTSB and Allied. App., *infra*, 113a-115a. A constitutional tort claim pursuant to the theory in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), was brought against the NTSB employees by way of their status as federal employees., for their wrongful conduct leading to his reduced settlement. App., *infra*, 114a-122a. (Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, was brought against the NTSB employees and Allied; intentional infliction of emotional distress, and interference with prospective economic advantage was brought under the Federal

Tort Claims Act (FTCA), 28 U.S. C. § 2671 *et seq.*, against the United States civil conspiracy and obstruction of justice was brought against Allied; and finally, injunctive relief was sought against all parties. App., *infra*, 99a-132a.

District Court Proceedings

The district court granted all of the defendants' motions to dismiss. App., *infra*, 25a.

For the defamation claim, the court held that the employees' conduct was within the scope of their employment, and so the Westfall Act, 28 U.S.C. § 2679 (b)(1), required that the claim be brought against the United States under the FTCA. App., *infra*, 11a-13a. However, although the FTCA waives sovereign immunity for most common law tort claims brought against the United States, it specifically excludes claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). Accordingly, the district court dismissed the defamation claim under the "libel, slander" exception. App., *infra*, 15a-16a.

In addition, the district court dismissed Wolk's claims of intentional infliction of emotional distress, and interference with economic advantage holding that they arose out of "libel, slander." App., *infra*, 15a-16a.

The district court dismissed Wolk's *Bivens* claim against the NTSB employees under the Fifth Amendment for their wrongful conduct forcing him to settle his defamation suit against the broadcaster at a significantly reduced amount. The court held that Wolk's constitutional rights in his cause of action were not violated because these employees "could not 'require' [Wolk] to settle" his claim. App., *infra*, 16a-17a.

The district court dismissed Wolk's RICO claim because it held the business or property injury element had not been adequately plead. App., *infra*, 17a-18a.

The conspiracy claim was dismissed because the underlying torts were held not actionable under the FTCA. App., *infra*, 21a-22a. Obstruction of justice was dismissed because the court held there was no private right of action under the federal statute, 18 U.S.C. § 1503. App., *infra*, 21a-22a. Finally, injunctive relief was denied because all of the other claims had been dismissed, and so there was no basis on which to provide relief. App., *infra*, 22a-23a.

Proceedings On Appeal

On appeal, Wolk argued that the Westfall Act should not bar his defamation claim against the employees of the NTSB, because they were not acting within the scope of their employment. He argued that the conduct of the employees in improperly interfering with his civil suit against Fox News by attempting to disclose a false report, did deprive Wolk of his constitutional rights in his cause of action by forcing him settle his case for a reduced amount because the constitutional right of access to the courts includes the right to effective and meaningful access. He also argued that the other torts were actionable under the FTCA based, not on the republishing of the false report on the internet by the NTSB employees, but rather by their attempted disclosure of the report to a local broadcaster in an attempt to deprive Wolk of his civil suit against the broadcaster. Wolk further argued that the allegations in his claim demonstrated that the blatantly wrongful and self-serving conduct of the NTSB employees stated an actionable claim for negligent supervision against the United States under the FTCA for its failure to protect him from these blatant abuses of power by employees of a federal investigative agency.

Without providing an analysis of the issues Wolk briefed, the court of appeals simply affirmed for the reasons provided by the district court. App., *infra*, 4a-6a. The court recognized that Wolk

had been wronged by the conduct alleged, but concluded that "there was not a legal basis for recovery." App., *infra*, 5a-6a.

Federal Court Jurisdiction

Jurisdiction in the district court was proper under 28 U.S.C. § 1331, providing jurisdiction for cases arising under federal law; under 28 U.S.C. § 1346(b) providing jurisdiction in civil cases where the United States is a defendant; under 28 U.S.C. § 1367 providing RICO jurisdiction; under 28 U.S.C. § 1367 providing supplemental jurisdiction for state law claims that are so related to the claims which fall under the district court's original jurisdiction, that they form part of the same case or controversy.

REASONS FOR GRANTING THE PETITION

Wolk was clearly wronged by the conduct of the NTSB. Had the actors not been federal employees, he would have had an actionable claim for defamation under the law of any state. But since they were, Wolk had no remedy at all according to the district court and court of appeals.

The fact that the defendant's were federal employees, in Wolk's view, only made the need to seek legal redress even more compelling, as he felt their intentional abuses of government power for the purpose of harming another person was particularly reprehensible.

Wolk provided strong legal arguments why the district court had erred, yet the court of appeals failed to fully analyze them. Because of their important federal law implications, their impact on the scope of liability in federal employment, the conflicts between the court below and relevant decisions of this Court, and the conflicts among the courts of appeals, three legal issues are presented by this matter that are particularly worthy of this Court's consideration on certiorari.

I. This Court Should Resolve The Issue Over Whether Deprivation Of The Constitutional Right Of Access To The Courts, Can Be Based On A Reduced Settlement

In his complaint, Wolk alleged that while his lawsuit against Fox News for defamation was pending, employees of the NTSB, for the purpose of harming Wolk in his case, and against their own rules and regulations, attempted to submit false information concerning Wolk to the broadcaster which would defeat Wolk's lawsuit. After spending large amounts of money on legal expenses in an effort to fight this wrongful disclosure, Wolk was finally forced to settle his case with the broadcaster at a severely reduced amount. The Third Circuit, affirmed the district court's dismissal of Wolk's *Bivens* claim for this violation of his constitutional right of access to the courts on the basis that the NTSB employees "could not 'require' [Wolk] to settle" and therefore they did not deprive him of his constitutional rights in his cause of action. App., *infra*, 17a.

A. The Third Circuit's Decision Conflicts With This Court's Recent Analysis Of The Constitutional Right Of Access, And With Other Circuits

The Third Circuit's holding represents a limited view of the constitutional right of access to courts, where the right is limited to the actual physical prevention of a person from entering the courtroom or filing suit. *See Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994) (explaining how in the period of 1985-89, when the conduct complained of occurred, a more expansive constitutional right of access was emerging, which includes the right to adequate, effective, and meaningful access, but *at that time* it was not yet clearly established enough to defeat the defendants' qualified immunity).

Earlier this year, this Court clearly recognized that a more expanded constitutional right of access to courts has emerged in the circuits in *Christopher v. Harbury*, 536 U.S. 403 (June 20, 2002). In that case, this Court analyzed a *Bivens* claim brought by a wife against U.S. Government officials for intentionally deceiving her and concealing information from her regarding the fact that her husband was being detained and tortured by the

Guatemalan army, thereby preventing her from bringing some sort of legal action to prevent his death. *Id.* at 418-19.

In analyzing its own decisions, this Court found that the right of access to courts is grounded in the Article IV Privileges and Immunities Clause,[1] the First Amendment Petition Clause,[2] the Fifth Amendment Due Process Clause,[3] and the Fourteenth Amendment Equal Protection[4] and Due Process Clauses of the Constitution.[5] *See Id.* at 424 n.12.

This Court recognized that two categories of the right of access to courts have emerged in its cases, and in the Courts of Appeals. *Id* at 423. The first category is when systemic official action is causing some kind of obstacle to the filing of suits, such as filing fees for the poor, and denial of legal services for prisoners. *Id.*

The second category is when specific official action has prevented an individual from being able to fully pursue their suit in court. *Id.* In this category, "[t]he official acts claimed to have denied access may allegedly have caused the loss or *inadequate settlement* of a meritorious case," *id.* (citing *Foster*, 28 F.3d at 429; *Bell v. Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984)) (emphasis added), "the loss of an opportunity to sue," *id.* (citing *Swekel v. River Rouge*, 119 F.3d 1259, 1261 (6th Cir. 1997), "or the loss of an opportunity to seek some particular order of relief,"

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[1] *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907); *Blake* v. *McClung*, 172 U.S. 239, 249 (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873).

[2] *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972).

[3] *Murray* v. *Giarratano*, 492 U.S. 1, 11 n. 6 (1989) (plurality opinion); *Walters* v. *National Assn. of Radiation Survivors*, 473 U.S. 305, 335 (1985).

[4] *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987).

[5] *Wolff* v. *McDonnell*, 418 U.S. 539, 576 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-381 (1971).

id at 424. This second category is the "backward-looking" denial of access claim, and exists when the relief sought in the underlying claim can no longer be obtained in the future. *Id.* at 424.

This Court cited cases from the First, Fifth, Sixth, Seventh, and Ninth Circuits[6] that had all recognized the backward-looking denial of access claim. *Id.* at 423 n. 7.

This Court explained that in order to state a claim for denial of the right of access to courts, the underlying claim must be "nonfrivolous" and "arguable", and that some circuits[7] required the suit to have actually been filed in a court. *Id.* at 424.

In *Christopher*, this Court found that the plaintiff had not stated a denial of access claim in that case because all of the tort claims that could have been pursued at the time of the alleged deception could still be pursued, and were in fact being pursued by her. *Id.* at 427-28. Therefore, a backward looking denial of access claim had not been successfully stated by the plaintiff in that case. *Id.*

Although this Court held that the plaintiff had not adequately stated a backward-looking denial of access claim under the facts of that case, it did acknowledge that those claims were being recognized in the Courts of Appeals, and that the right of access claims had been recognized in many of its own decisions. By analyzing the plaintiffs case under the backward looking denial of access standard, this Court appeared to demonstrate its approval of the viability of such a denial of meaningful access claim, including when it is based on wrongfully reduced settlements.

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[6] citing *Delew* v. *Wagner*, 143 F.3d 1219, 1222-1223 (9th Cir. 1998); *Swekel*, 119 F.3d at 1263-1264; *Vasquez* v. *Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995); *Foster*, 28 F.3d at 429-431 (5h Cir. 1994); *Williams* v. *Boston*, 784 F.2d 430, 435 (1st Cir. 1986); *Bell*, 746 F.2d at1260-1266 (7th Cir. 1984); *Ryland* v. *Shapiro*, 708 F.2d 967, 974-975 (5th Cir. 1983).

[7] *See Delew*, 143 f.3d at 1222-1223 (9th Cir. 1998); *Swekel*, 119 F.3d at 1263-1264.

Wolk's *Bivens* claim against the employees of the NTSB for the deprivation of his right of access to the courts satisfied the criteria for a backward-looking denial of access claim that this Court explained was required in *Christopher*. The underlying claim was certainly "nonfrivolous" and "arguable", in that it had actually been filed against the broadcaster in court. Furthermore, the reduced settlement that Wolk was forced into by the wrongful conduct of the NTSB employees effectively foreclosed any future remedy Wolk could obtain against Fox News for its defamatory broadcast.

The Third Circuit's denial of this claim, on the grounds that a reduced settlement does not amount to a denial of access claim, is in clear conflict with this Court's holding in *Christopher*, and with the broad right to adequate and effective access to courts recognized in the First, Fifth, Sixth, Seventh, and Ninth Circuits in the cases cited above.

B. This Constitutional Issue Is Of National Importance And Is Recurring

The issue of whether the intentional efforts of government officials to interfere with a civil suit, thus forcing a plaintiff to settle his/her case at a reduced amount, is actionable as a backward-looking denial access claim is an important question of constitutional law.

Although the courts of appeals are only recently recognizing the full extent of the constitutional right of access to the courts as a right that must be adequate, effective, and meaningful, *see e.g.*, *Foster*, *supra*, 28 F.3d at 429; *Bell*, *supra*, 746 F.2d at 1261, the right has long been considered a fundamental aspect of civil liberty that is at the very foundation of our political system and heritage. As Justice Marshal wrote early in the nation's history:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. 137, 163 (1803).

In support of this Courts holding that a state's non-waiver of divorce filing fees for the poor violated the due process right of access to the courts, Justice Harlan stated about the right of access in *Boddie* v. *Connecticut*:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . .
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement . . . on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.

401 U.S. 371, 374-375 (1971).

On another occasion, this Court said about the importance of the right to access:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . .

Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142, 148 (1907).

The right of access to the courts is a fundamental right, analogous to the right to vote because it is deemed essential for the adequate preservation of all other rights. [8]

With respect to the constitutional right of access to the courts as it derives from the First Amendment, this Court said earlier this year:

> The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the *most precious of the liberties safeguarded by the Bill of Rights*," *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and have explained that the right is implied by "the very idea of a government, republican in form," *United States* v. *Cruikshank*, 92 U.S. 542, 552, 23 L. Ed. 588 (1876).

BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2002 U.S. LEXIS 4653 at *17-18 (June 24, 2002) (emphasis added).

Since the constitutional right of access to the courts is such a fundamental component of our political liberty, the issue of whether the right includes adequate, meaningful, and effective access should be resolved.

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[8] One scholar said about the striking similarity between the right to vote and the right of access to the courts:

> Both the voting and litigating interests base a claim to "fundamentality" on the idea that they are "preservative of all rights";[8] of both it can be said that "in social compact terms, in exchange for this legal orderly method of resolving disputes, one restricts his power to satisfy his claims by force."[8] It is said that "ability to litigate just claims, like availability of the franchise, gives legitimacy to the state's coercive power."[8]

Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (Part II), 1974 Duke L. J. 527, 534 (1974).

For many, the right to access the courts depends not on whether they can actually get their case into the courts, but whether they can effectively pursue their claims, unimpeded by wrongful obstruction from government officials.

This problem was well illustrated in *Foster*, *supra*, where city officials, in an effort to harm the plaintiffs' wrongful death suit against the city allegedly failed to respond to interrogatories, destroyed police officers' log records, withheld the log records, gave false testimony in their depositions, and wrongfully induced police officers to remain silent about their knowledge of this cover-up. 28 F.3d at n.4

In *Bell*, *supra*, it was the police officers themselves who were alleged to have covered up evidence regarding their own wrongful shooting. 746 F.2d at 1214.

These cases, as well as Wolk's experience with the NTSB employees, illustrate the importance of deciding the issue of whether the constitutional right of access to the courts includes the right to adequate, effective, and meaningful access. Government officials are often in a unique position with the power to obstruct or mislead the judicial process. Whether this conduct amounts to an actionable constitutional claim against the officials is a very pressing issue.

Allegations of government official conduct of this sort is frequent in many cases, and so the issue is certainly recurring. Resolving the issue would provide a nationwide standard by which to measure the denial of the right of access to the courts. It would provide government officials a clear standard for what conduct is permissible and what is not. Additionally, a favorable ruling on this issue would increase public trust in governments and in the judicial process, by increasing accountability in a time when many feel powerless to prevent government abuses, corruption, and cover-ups.

C. The Constitutional Right Of Access To The Courts Includes The Right To Adequate, Effective, And Meaningful Access

The Third Circuit incorrectly denied Wolk's constitutional claim against the employees of the NTSB on the basis that their alleged conduct did not rise to the level of a constitutional violation because the employees did not force him to settle his case for a reduced amount. Effectively, that holding rejected the constitutional right of access to the courts as including adequate, effective, and meaningful access, by holding that wrongful government official conduct short of physically preventing someone from getting their case into court at all can still violate the constitutional right of access.

Such a decision conflicts with this Court's endorsement of a broader right of access to the courts in *Christopher*, where in analyzing cases in the courts of appeals, the Court stated that one strand of the denial of access claim can be based on "the loss or inadequate settlement of a meritorious case."

In *Christopher*, this Court endorsed the denial of adequate, meaningful, and effective access claim, but did not have the opportunity to explicitly hold that such claims were viable in either a *Bivens* action, or an action under 42 U.S.C. § 1983,[9] as this Court was able to resolve the issue without deciding this constitutional issue.

The right of access to the courts is a well established constitutional right, recognized in the Courts of Appeals, by this Court in various constitutional provisions, as discussed above; and it was recognized early by this Court to be a fundamental aspect of our ordered society.

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[9] In regard to the cases in the First, Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeals, this Court said, "we assume, without deciding the correctness of the decisions." *Christopher*, *supra*, 536 U.S. at 423 n. 7. In that case, this Court found that a backward-looking denial of access claim, if valid, had not been stated in this case because the plaintiff's opportunity to pursue her claims still existed. *Id.* at 427-28.

The concept that important constitutional rights include the right to their adequate, meaningful, and effective exercise is hardly a novel concept in this Courts constitutional jurisprudence.

For example, the Sixth Amendment provides a criminal defendant only with the right to "have the assistance of counsel for his defence," U.S. Const. Amend. VI, yet this Court has interpreted the right to include the right to *effective* counsel because allowing ineffective counsel would deprive the Sixth Amendment of its substantive protection. *See Strickland v. Washington*, 466 U.S. 668 (1984).

To make the right to be free from an unreasonable seizure meaningful, this Court does not define its scope by actual physical seizure of a person, but rather by the effect on a person's perception, i.e., whether "a reasonable person would believe that he or she is not 'free to leave.'" *Florida v. Bostick*, 501 U.S. 429, 435 (1991). Likewise, a search can occur under the Fourth Amendment, when no actual physical search occurs, such as the use of heat detection equipment to gain a view inside a house, *effectively* such conduct amounts to a search because the bottom line is that the police are privy to information that without the heat sensing technology, they could only get by actually entering the house; and so its use would deprive the right of to be free from unreasonable searches within the home of any *meaning*. *See Kyllo v. United States*, 533 U.S. 27 (2001).

A denial of the fundamental right to vote in violation of equal protection occurs, not just when a class of people are denied actual physical access to the polls, but also when the strength of their vote is diluted. *See Mahan v. Howell*, 410 U.S. 315 (1973).

Like all other constitutional rights, the constitutional right of access to the courts must include the right to its adequate, effective, and meaningful exercise under this Court's principles of constitutional law. Therefore, when official action intentionally

and wrongfully interferes with an individual's civil suit, thus forcing a reduced settlement, that individual's constitutional right of meaningful access to the courts has been deprived, and such conduct should constitute a viable constitutional tort claim against those officials whether under the *Bivens* remedy (federal officials), or under 42 U.S.C. § 1983 (state and local officials).

II. This Court Should Resolve The Issue Of Whether A Heightened Pleading Standard Applies To The Injury/Standing Element Of A Civil RICO Claim

Wolk alleged in his complaint that Allied and employees of the NTSB were liable under the civil remedy, 18 U.S.C. § 1964(c), for the business injuries he suffered as a result of their activities which violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*. (App., *infra*, 99a-114a.

A. Petitioner's Civil RICO Claim

Wolk alleged that Allied and the employees of the NTSB violated the following provisions of RICO, 18 U.S.C. § 1962:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

For purposes of RICO, "racketeering activity" is defined in part as "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . section 1503 (relating to obstruction of justice)." 18 U.S.C. § 1961(1)(B).

Under 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." In civil RICO claims, the "business or property" injury is referred to as the standing requirement. *See Sedima, S.P.R.I. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

In his complaint, Wolk alleged in specific detail conduct on the part of Allied and the NTSB employees that amounted to violations of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), and 1503 (obstruction of justice) in connection with the investigation of his accident. (App., *infra*, 99a-114a).

Wolk explained that through this pattern of violations (racketeering activities), the NTSB employees and Allied were able to exercise influence and control in, and participate in the affairs of, an enterprise, the NTSB, whose activities affect foreign and interstate commerce. (App., *infra*, 99a-114a).

Furthermore, Wolk alleged standing for civil RICO under 18 U.S.C. § 1964 by alleging that he was injured in his business as a result of these RICO violations. (App., *infra*, 108a-110a). Specifically, Wolk alleged that these RICO violations led to an incorrect investigative report by the NTSB which falsely attributed to him poor aviation skills, experience, and expertise. (App., *infra*,

56a-77a; 99a-113). Since Wolk's entire business is built on, and depends on his reputation as an expert in the field of aviation, (App., *infra*, 93a-95a), the publishing and republishing of this false information, which is the result of fraud and misrepresentation, caused him business losses. (App., *infra*, 108a-110a) ("As a further consequence of the continued violations of [RICO] by the defendants, the plaintiff has suffered injury to his business and his property, to wit, he has lost large sums of income as previously set forth, has been caused to incur huge expenses to maintain his law practice to overcome the adverse publicity generated by the deliberate misleading of the NTSB, has suffered substantially increased costs of operation . . . and therefore has standing to prosecute this claim under 18 U.S.C. § 1964(c)."). The business injuries Wolk suffered are repeated throughout his complaint.[10]

B. Proceedings Below

The district court dismissed the civil RICO claim against the NTSB employees on the basis that it was barred by the slander exception to the FTCA. (App., *infra*, 14a-16a). The district court also dismissed the RICO claim against Allied on the basis that he had not alleged specific and quantifiable business or property injury as a result of the defendants' RICO violations as required by the Third Circuit in *Maio v. Aetna, Inc.*, 221 F.3d 472, 495 (3d Cir. 2000), as Wolk's claimed injury was "vague and highly speculative". (App., *infra*, 17a-18a). According to the district court, even though Wolk had alleged injury to his business, e.g., by alleging that he lost "large sums of income," the allegations were insufficient to establish standing under civil RICO. (App., *infra*, 17a-18a).

The Third Circuit affirmed the decision of the district court without providing an analysis of the RICO issue. However, the

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[10] E.g., "plaintiff would expect and has experienced prospective clients not to call, referrals not to come," (App., *infra*, 95a-96a); "the plaintiff has been damaged in his business and profession," (App., *infra*, 97a-98a); "these defendants nonetheless continued their conspiracy to defame the plaintiff and to falsify reports, tests and documents for purposes of their later disclosure, which would . . . damage the plaintiff in his business, profession and reputation," (App., *infra*, 114a-115a).

district court's dismissal of Wolk's RICO claim against the employees of the NTSB on the basis that it was barred by the slander exception to the FTCA is *clearly incorrect*.[11] Accordingly, it can be assumed that the Third Circuit affirmed on the basis that business injury had not been adequately pled by Wolk, under its own precedent in *Maio*.

C. There Is A Conflict In The Courts Of Appeals, And With The Precedent Of This Court Over The Standard Of Pleading Business Or Property Injury In Civil RICO

The business damages Wolk alleged he already suffered as a result of the defendants' RICO violations were dismissed by the courts below as being "vague."[12] In so holding, the Third Circuit conflicts with the precedent of this Court and the Tenth Circuit.

Although a heightened standard of pleading applies to allegations of RICO violations under section 1962, it does not apply to pleading business or property injury under the section 1964 standing requirement for civil RICO. In *NOW v. Scheidler*, this Court applied the ordinary notice pleading standard to the standing requirement under civil RICO, stating that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for, on a motion to dismiss,

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[11] The district court's holding that a civil RICO claim could be barred as arising out of the intentional tort exception to the FTCA is a result of *clearly* incorrect statutory analysis.

Wolk's RICO action was brought against the employees of the NTSB. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), when a claim sounding in state law tort is brought against employees of a federal agency who acted within the scope of their employment, the plaintiff must proceed exclusively under the FTCA against the United States and cannot maintain the tort action against the employees themselves. In that case, since the plaintiff is then proceeding under the FTCA against the United States, if the claim arises out of the intentional tort exception, it is barred.

However, the Westfall Act specifically provides that the FTCA is not a plaintiff's exclusive remedy for claims based on the United States Constitution, or violation of a federal statute. 28 U.S.C. § 2679(b)(2). Since RICO is a federal statute, Wolk's claim against the employees was not under the FTCA and therefore the intentional tort exception to the FTCA has absolutely no bearing on civil RICO claim.

[12] To the extent that the future damage to his business was alleged, that portion was dismissed as "speculative" and is a separate issue than the issue of the specificity required in pleading actual present damages.

we presume that general allegations embrace those specific facts that are necessary to support the claim." 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In *NOW*, where the plaintiffs' only allegation of business or property injury was the statement that the defendants' RICO violations "had injured [their] business or property interests," this Court found that "nothing more is needed to confer [RICO] standing on [plaintiffs] at the pleading stage." *Id.* at 249.

In *Robbins v. Wilkie*, 300 F.3d 1208, 2002 U.S. App. LEXIS 17286 (10th Cir. Aug. 21, 2002), under the authority of this Court's decision in *NOW*, the Tenth Circuit rejected a defendant's argument that RICO plaintiff's must plead business or property injury with particularity.

The Third Circuit's decision below, by finding Wolk's allegations of actual present business injury as a result of the NTSB employees' and Allied's RICO violations and conspiracy, insufficiently stated, and thus dismissing the RICO claim, conflicts with the authority of this Court under *NOW*, and with the Tenth Circuit.

D. This Is A Recurring Issue As Lower Courts Have Sought To Limit The Breadth Of Civil RICO By Imposing Improper Requirements

Although this Court applied the lenient standard of pleading under FRCP 8 to the standing requirement of a RICO claim in *NOW*, this Court should clarify the issue of whether courts below are free to impose some sort of heightened pleading standard for allegations of business or property injury in civil RICO. This is because, as the court did below, courts are apt to dismiss these allegations of business or property injury, when they are generally stated and specific numbers are not provided in the complaint, as "vague" and/or "speculative." At the district court level, the decision below in this case has now become the authority for that court's rule that RICO plaintiff's must plead their damages with particularity. *See Burns v. Lavender Hill Herb Farm, Inc.*, No. 01-CV-7019 (E.D. Pa. October 30, 2002).

Unless the appropriate pleading standard for civil RICO injury is clarified by this Court, lower courts are likely to impose heightened pleading standards on RICO plaintiffs. The first reason is that, because the RICO violation itself must be alleged with particularity under FRCP 9(b), unguided courts are likely to scrutinize the entire RICO complaint under this heightened standard which requires detailed factual allegations. *See Robbins*, 2002 U.S. App. LEXIS 17286 at *6.

The second reason stems from the problem that courts below, have sought to limit the broad scope of the civil RICO remedy because it is disfavored, and have a history of adding their own judicially imposed requirements to state a claim, including improper heightened pleading requirements. *See* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. on Legis. 1, 18-22 (1993).

Previous attempts to limit civil RICO by lower courts included the requirement that plaintiff suffers a "racketeering injury" separate from the harm caused by the predicate acts, and the requirement that the RICO defendants have a prior criminal conviction. *See* David Kurzweil, *Criminal and Civil RICO: Traditional Cannons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J. L. & Soc. Probs. 41, 71 (1996). In *Sedima*, *supra*, this Court rejected both of these requirements, finding that "if Congress's liberal-construction mandate is to be applied anywhere, it is in section 1964, where RICO's remedial purposes are most evident," 473 U.S. at 491-92, 492 n.10, and that "there was no room in the statutory language for an additional, amorphous 'racketeering injury' requirement, *id.* at 495.

However, "[d]espite the *Sedima* Court's endorsement of civil RICO's broad scope and its liberal interpretation of [the standing requirement], 'judicial efforts to narrow its scope continue largely unabated.' Kurzweil, *supra*, at 72 (quoting G. Robert Blakely & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wolersheim*: Will Civil RICO*

Be Effective Only Against White-Collar Crime?, 62 Notre Dame L. Rev. 526, 580 (1987).

Even after *Sedima*, "the lower courts, more recently uninhibited by the Supreme Court, are reading an "organized crime" limitation into the statute by excluding "white collar" crime despite the manifest intention of Congress . . . and the Supreme Court." G. Robert Blakely, *Of Characterization And Other Matters: Thoughts About Multiple Damages*, 60 Law & Contemp. Probs. 97, 121 n.95 (1997).

This tendency of the lower courts to add judicially imposed requirements to civil RICO, in spite of the breadth of the remedy, and Congressional intent, amounts to improper judicial legislation.

Although this Court's decisions in *Sedima* and *NOW* demonstrate that there is no heightened pleading requirement for civil RICO injury, a specific ruling on this issue is needed to prevent lower courts from continuing to impose their own unique requirements, thus defeating the statutory intent behind the remedy.

E. This Court Should Hold That, Although RICO Violations Must Be Alleged With Particularity, Their Is No Similar Heightened Pleading Requirement For RICO Injury

This Court has already held that general, unspecific allegations of business or property injury were sufficient in a civil RICO claim in *NOW*. However, the Court did not specifically declare as a broad rule of law that the general notice pleading standards under Rule 8 of the Federal Rules of Civil Procedure apply, with the same degree of force, to allegations of business or property injury in a civil RICO claim. This Court should grant certiorari on this question to make the issue clear for courts below, and prevent RICO plaintiffs from being dismissed, contrary to statutory intent, for "vague" allegations of damages.

III. This Court Should Resolve The Conflict Over Whether Negligent Supervision Can Be Brought Against The United States Under The FTCA

In his brief in the Court below, Wolk argued that the NTSB had negligently supervised its employees, by allowing them to intentionally publish false investigative findings regarding Wolk, for the purpose of defaming him, and to attempt to disrupt his civil suit against a third party by disclosing damaging false information. The Third Circuit affirmed the decision of the district court in dismissing Wolk's complaint without analyzing this claim. However, it can be assumed that its affirmance of the District Court's dismissal amounted to a rejection of the claim on the grounds that, since the underlying conduct of the NTSB employees was not actionable under the FTCA, the alleged negligence of the NTSB in supervising the employees was also not actionable, because the claim "arose out of" defamation.

A. There Is A Conflict In The Courts Of Appeals Over Whether Negligent Supervision Is Actionable Under The FTCA

The FTCA's waiver of sovereign immunity against the United States for common law torts committed by its employees contains exceptions for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The exception excluding these specified common law torts is commonly referred to as the "intentional torts exception".

Currently, only the Ninth Circuit has expressly held that a negligent supervision claim is actionable against the United States when a government employee commits one of these intentional torts. *See Senger v. United States*, 103 F.3d 1437 (9th Cir. 1996). A majority of circuits have held that such a claim is not actionable against the United States because it arises out of the intentional tort committed by the employee, and is thus barred by the intentional torts exception. *See Billingsley v. United States of America*, 251 F.3d 696 (8th Cir. 2001); *Leleux v. United States*, 178 F.3d 750,

756 (5th Cir. 1999); *Franklin v. United States*, 992 F.2d 1492, 1499 (10th Cir. 1993); *Guccione v. United States*, 847 F.2d 1031, 1035-37 (2d Cir. 1988), *cert. denied*, 493 U.S. 1020 (1990); *Thigpen v. United States*, 800 F.2d 393, 396-96 (4th Cir. 1987); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986). By denying Wolk's claim for negligent supervision below, the Third Circuit joins the majority on this issue.

The Ninth Circuit's minority view has been adopted by the Massachusetts District Court. *Chaabonni v. City of Boston*, 133 F.Supp.2d 93 (D.Mass. 2001).

B. Decisions Denying Negligent Supervision Claims Against Government Employees Conflict With This Court's Long Established Interpretation Of The FTCA Exceptions

Although the Ninth Circuit is the only court of appeals that interprets the FTCA as allowing a claim of negligent supervision to be brought against the United States the majority's interpretation of the intentional torts exception to the FTCA conflicts with this Court's relevant precedent.

The courts of appeals who have construed the intentional torts exception to exclude negligent supervision, have based their reasoning that the "arising out of" language in the FTCA should be construed broadly on a *plurality* decision of this Court, *United States v. Shearer*, where *four Justices* believed that a claim against the United States for the Army's negligent supervision of an serviceman, known to be dangerous, which resulted in the enlistee's kidnapping and murdering of another serviceman, was not actionable under the FTCA because it arose out of assault and battery, 473 U.S. 52, 55 (1985). The plurality claimed that the term "arising out of" was intended by Congress to sweep broadly, and cover claims "that sound in negligence but stem from a battery." *Id.*

The courts of appeals have adopted this plurality opinion as the basis for their broad construction of the intentional tort exception. The problem is, *Shearer* was only a plurality, and

therefore not controlling, and it represented a departure from this Court's historically *narrow and strict* interpretation of the intentional torts exception; and in the subsequent majority holding, *Sheridan v. United States*, 487 U.S. 392 (1988), this Court returned to the narrow interpretation of the intentional tort exception. Thus the adoption of the *Shearer* plurality by the courts of appeals conflicts with this Court's historically narrow approach to the intentional tort exception as well as its *current narrow approach* to the exception in *Sheridan*.

This Court's Historical Interpretation Of The FTCA Exceptions

For years this Court held that exceptions to the FTCA are strictly limited to those provided by Congress, finding that "[there] is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress." *See Rayonier, Inc. v. United States*, 352 U.S. 315, 321 (1957).

In specifically listing named common law torts, Congress borrowed a term of art, and accordingly, it is assumed that it borrowed the established tort definitions. *Molzof v. United States*, 502 U.S. 301, 307-08 (1992). In *Molzof* this Court held that whether damages were punitive, which is not allowed under the FTCA, is determined by the common law definition of punitive damages, not by the punitive character of a damage award. *Id.* In support, this Court stated:

> A cardinal rule of statutory construction holds that: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." Morissette v. United States, 342 U.S. 246, 263 (1952). . . .

> This rule carries particular force in interpreting the FTCA. "Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.'" United States v. Neustadt, 366 U.S. 696, 707 (1961) (quoting United States v. Spelar, 338 U.S. 217, 219-220 (1949)).

Id.

In *United States v. Muniz*, 374 U.S. 150 (1963), this Court held that a prisoner who was assaulted by fellow inmates could recover against the United States under the FTCA for the prison officials' negligence in failing to prevent the assault.

In *Block v. Neal*, this Court held that, although the plaintiff's claim for misrepresentation against the United States fell under the intentional tort exception to the FTCA, the plaintiff could still bring a claim against the United States for its conduct that amounted to negligence, stating:

> the partial overlap between . . . two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. *Neither the language nor history of the Act* suggests that when one aspect of the Government's conduct is not actionable, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct.

460 U.S. 289, 298 (1983) (emphasis added).

Collectively, these cases demonstrate that this Court has historically interpreted the intentional tort exception to the FTCA very narrowly, limiting it to the actual common law definition of the torts specifically provided, and excluding no others.

The *Shearer* Plurality And *Sheridan*'s Return To Precedent

In *United States v. Shearer*, this Court seemed to depart from its well established narrow approach to the intentional tort exceptions, by the plurality's interpretation of the term "arising out of" as a broad and sweeping exclusion of all other claims based on the same factual situation. 473 U.S. at 55-56.

However, although *Shearer* departed from this Court's established approach to the intentional torts exception, as a plurality opinion, it was not a controlling departure.

In *Sheridan v. United States*, this Court held that a claim against the government for the negligent supervision of an employee who was not acting within the scope of his employment when he committed an assault and battery, did not arise out of the assault and battery as it was based on an independent tort duty of care. 487 U.S. 392, 400-403 (1988). In *Sheridan*, this Court did not decide the issue of whether a negligent supervision claim could be had against the government when an employee commits an intentional tort while acting within the scope of their employment, however, it did decline to read the "arising out of" language so broadly as to apply to other, non-specifically excluded tort claims based on the same course of events. Thus, in *Sheridan* this Court demonstrated that its prior approach in reading the intentional tort exception to the FTCA narrowly was still the controlling approach.

In the sense that this Court adheres to precedent and maintains its approach to a narrow construction of the intentional tort exception, the courts of appeals' holding that the exception is so broad and sweeping as to exclude valid claims based on negligent supervision (under the law of the relevant state) is in conflict with this Court's long established precedent, and is based on the plurality's departure from said precedent in *Shearer*.

Even if these cases do not constitute a *clear* departure from this Court's precedent, to the extent that *Sheridan* made it unclear as to whether negligent supervision is excluded by the intentional tort exception when a government employee has acted within the scope of his/her employment, this Court should resolve the issue.

C. This Is An Important Federal Issue That Needs Resolved

This is a significant issue and its ambiguity has caused conflicting case law, and sparked academic interest in what the proper rule is, and how this Court is predicted to rule on the issue. *See* Jared M. Viders, *Negligent Hiring, Supervision, and Training—The Scope of the Assault and Battery Exception: Senger v. United States*, 39 B.C. L. Rev. 452 (1998).

With the tort of negligent supervision being actionable in the Ninth Circuit against the United States, while unactionable against it in all of the other circuits that have considered the issue, there is a significant lack of uniformity in the Federal Circuits regarding the potential liability of the United States.

The United States government itself should have a great interest in resolving this issue, so that there is predictability and uniformity regarding whether it will be held to a duty of care as an employer.

As thoroughly discussed above, the right of access to the courts is a significant right, and the issue of whether people injured as a result of the intentional torts of federal employees will be able to seek redress in court for the government's negligent supervision will depend on what Circuit their claim is brought in. This creates forum shopping problems, and leads to location dependent results, even though the same federal law is being interpreted, and this is another reason the issue should be resolved.[13]

D. Established Precedent Strictly Limits The Intentional Torts Exception To The Common Law Definition Of The Torts Congress Provided

Following the broad and sweeping approach to the intentional torts exception to the FTCA that the plurality endorsed in *Shearer*, thus excluding a claim for negligent supervision as arising from an intentional tort, would constitute a departure from this Court's established precedent that the intentional torts listed in the exception to the FTCA are to be strictly defined by their common law definitions, *Molzof, supra*, 502 U.S. at 307-08, that separate common law torts are not barred simply because of their overlap with an excepted intentional tort, *Block, supra*, 460 U.S. at 298,

[13] Referring to the scope of the intentional tort exception to the FTCA, not the viability and parameters of negligent supervision as a tort itself, which is an issue of the particular state's law.

and that "[there] is no justification for [courts] to read exemptions into the [FTCA] beyond those provided by Congress," *Rayonier, supra*, 325 U.S. at 321.

The approach of examining the legislative history of the FTCA in order to arrive at an interpretation of the exceptions that is broader than the torts specifically provided, taken by the *Shearer* plurality is not supported by this Court's precedent.

The answer to this issue can be arrived at simply by following this Court's rule that the excluded intentional torts are strictly limited to those provided, and defined by common law principles. Under traditional common law principles, negligence claims are based upon a duty of care that is breached, resulting in an injury. If an employer is under a duty of care to prevent its employees from causing harm to another, and that duty is breached, the intentional tort that is committed by the employee is only the *injury* element of the negligent supervision claim. In other words, the negligent supervision claim is not a crafty way of casting an intentional tort in terms of negligence, but rather is a separate and distinct tort, based on an independent duty. For practical purposes, a claim in negligent supervision will not defeat the intentional torts exception allowing for a claim against the government every time an employee commits an intentional tort; rather, it can only be stated when a truly separate duty to protect the public from an employee's conduct is established and breached. *See* Viders, *supra*, at 460-61 (explaining that if this Court examined the issue by applying common law tort principles, it should side with the Ninth Circuit on the issue).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR ALAN WOLK
Pro Se Petitioner
WOLK & GENTER
1710-12 LOCUST STREET

PHILADELPHIA, PA 19103
(215) 545-4220

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-4112

ARTHUR ALAN WOLK,
Appellant,

v.

UNITED STATES OF AMERICA, NATIONAL TRANSPORTATION SAFETY BOARD, TEN UNKNOWN NTSB EMPLOYEES, ALLIEDSIGNAL, INC. and HONEYWELL INTERNATIONAL, INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANNIA
(D.C. Civ. No. 00-cv-06394)
District Judge: Honorable Ronald L. Buckwalter

Argued July 15, 2002
Before: McKee, Weis and Duhe', Circuit Judges

Arthur Alan Wolk, Esquire (ARGUED)
WOLK & GENTER
1710-12 Locust Street
Philadelphia, PA 19103

Attorney for Appellant (pro se)

Richard M. Bernstein, Esquire (ARGUED)
Assistant United States Attorney
Patrick L. Meehan, Esquire
United States Attorney
James G. Sheehan, Esquire
Assistant United States Attorney
Chief, Civil Division
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476

Attorneys for Appellees National Transportation Safety Board ; United States of America; Carol Dinwiddie; Daniel Campbell; Frank Gattolin; and Ted Unknown NTSB Employees

Patricia Proctor, Esquire (ARGUED)
William M. Brown, III, Esquire
Jason P. Gosselin, Esquire
DRINKER, BIDDLE & REATH, LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996

Attorneys for Appellees Allied Signal, Inc. and Honeywell International, Inc.

OPINION

WEIS, Circuit Judge.

Because this Opinion is non-precedential, we will only briefly sketch the pertinent facts of the case.

Plaintiff is an attorney specializing in the representation of parties injured or killed in airplane accidents. He is also an experienced amateur aviator. In 1985, plaintiff purchased a Korean War-era jet fighter plane, a Grumman F9F-2 Panther, which he had restored to flying condition. The FAA issued plaintiff a permanent license in 1987, and he flew the Panther in a number of air shows in the years following.

In September 1996, plaintiff experienced problems with the fuel system shortly after takeoff and was forced to make an emergency landing. The plane overshot the runway, crossed a highway and ultimately crashed into a hill. Plaintiff sustained serious injuries, but fortunately recovered.

The National Transportation and Safety Board, with the assistance of the AlliedSignal Company, investigated the accident and prepared a report. After reviewing the findings, plaintiff advised the Board that the report contained a number of errors, particularly with respect to his authorizations and qualifications to fly the Panther. The Board, conceding its

mistakes, apologized to plaintiff, withdrew the report, and advised those who had obtained a copy of it of the errors. It then initiated another investigation in which some of the errors were corrected. Unfortunately, its second report, which apparently posted on the NTSB's website in late December 1999, reiterated errors contained in the original report, including those suggesting that plaintiff was not qualified to fly the Panther.

Plaintiff filed suit in the United States District Court for the Eastern District of Pennsylvania against the NTSB, some of its employees and AlliedSignal. His 53-page second amended complaint, together with a number of attached exhibits, alleged eight separate causes of action and sought compensatory and injunctive relief. The District Court, after conducting an exhaustive examination and analysis of each of the counts, dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b) (6), for failure to state a claim. We have carefully reviewed the District Court's opinion and,

despite the excellent brief and oral argument on appeal by plaintiff, do not find reversible error.

We can understand the plaintiff's frustration with the Board's actions. Although it acknowledged errors in its original report posted on the Internet, apparently through some sort of bureaucratic bumbling the Board repeated the same mistakes in the second report. We are certain that the District Court also sympathized with the plaintiff's irritation, but concluded-as do we-that there was not a legal basis for recovery.

With respect to plaintiff's criticism of the "party system" employed by the NTSB in accident investigations, we are persuaded that changes to that procedure is a matter for Congress and not the courts. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

Accordingly, the judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Joseph F. Weis, Jr.
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	No. 00-CV-6394
	:	
UNITED STATES OF AMERICA,	:	
NATIONAL TRANSPORTATION	:	
SAFETY BOARD, TEN	:	
UNKNOWN NTSB EMPLOYEES,	:	
ALLIEDSIGNAL INC. and	:	
HONEYWELL INTERNATIONAL,	:	
INC.,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J. October 25, 2001

Currently before the Court are Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint. Arthur Alan Wolk ("Plaintiff") alleges a total of eight counts against the three defendants: (1) the National Transportation Safety Board, an independent federal government agency, and through it, the United States government ("NTSB" or "the Government"); (2) Ten Unknown NTSB Employees ("Employees"); and (3) AlliedSignal, now Honeywell International, Inc. ("AlliedSignal"). Defendants seek dismissal of all counts. The Court will grant Defendants' motions and will dismiss Plaintiff's complaint in its entirety.

I. BACKGROUND

The case at bar centers around an NTSB investigation and accompanying NTSB report regarding an airplane crash in

which Plaintiff was the pilot. Following Plaintiff's accident, NTSB, with contributions from AlliedSignal, a manufacturer of airplane components, investigated the crash, assessed possible causes for it and generated a report for publication on NTSB's website. Upon reading the report, Plaintiff identified some alleged misstatements or inaccuracies and brought them to NTSB's attention. Accordingly, NTSB withdrew the report, disseminated corrections and apologized to Plaintiff. Plaintiff emphasizes in his complaint that, "[o]ne of the most egregious errors [was the implication that]...plaintiff was not properly licensed to fly...." Compl. ¶ 37. This "error" allegedly occurred because NTSB relied on misinformation provided by a news reporter.

After removing the first report, NTSB conducted a second investigation and, with Plaintiff's contributions, drafted another report. Nonetheless, Plaintiff alleges that "factual mistakes" from the initial report reappeared in the second website report. Compl. ¶ 49. Plaintiff alleges that these inaccuracies, and specifically the one about Plaintiff's license, have created a negative impression of him in the media and in the community, thereby damaging his reputation. This alleged injury, Plaintiff claims, has resulted in a loss of business prospects and in public humiliation.

Additionally, Plaintiff suggests that these "errors" were intentional and personally motivated. As a successful aviation attorney, Plaintiff asserts that he has devoted his legal career to "handling airplane crash cases for the families of those killed or injured." Compl. ¶ 8. He also claims to be a preeminent aviation expert, sought after by news media and clients. Compl. ¶ 10. Plaintiff contends that on account of his legal success and his investigative skill he has "angered employees of the NTSB, who were embarrassed and annoyed that they could spend years 'investigating' accidents and not come up with the correct cause, while some lawyer was able to do so consistently." Compl. ¶ 11. Therefore, Plaintiff

contends, Defendants were deliberately careless and reckless in investigating Plaintiff's accident and provided misinformation that "has and will destroy him both professionally, personally and emotionally." Compl. ¶ 141, 159 (c-g). Accordingly, Plaintiff brought this action targeting the nature of the investigation, the alleged inaccuracies of NTSB's reports and the alleged effect of the false statements in the report on Plaintiff.

II. LEGAL STANDARD

For a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court looks first at the language of the rule which provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the court must only consider those facts alleged in the complaint. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). Also, the court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

Plaintiff's complaint contains the following eight counts: (1) Willful, Wanton, Reckless and Negligent Interference with Business, Profession and Property Rights;

(2) Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; (3) Defamation and Trade Libel; (4) Denial of Equal Protection Under the Fifth Amendment of the United States Constitution; (5) Intentional Infliction of Emotional Distress; (6) Obstruction of Justice and Lying to a Federal Agency; (7) Civil Conspiracy and Concerted Action; and (8) Equitable Relief and Injunction. Each defendant is charged with a different combination of counts.

A. Claims Barred By the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

1. Claims Against Employees

Plaintiff asserts claims against Ten (10) Unknown NTSB employees, and specifically served three individuals who he explains are not named defendants but instead represent the unknown employees for the purpose of effectuating service of process.[1] Accordingly, the Court will treat the three named employees in the same manner as the unknown ones.

The Court will dismiss the claims against all employees because the claims arise out of behavior that occurred while the employees were acting within the scope of their

employment. Therefore, only the Government could be liable for the employees' behavior. See Brumfield v. Sanders, 232 F.3d 376, 383-4 (3d Cir. 2000). Plaintiff disagrees with the first premise of this analysis contending that Employees failed to follow NTSB procedures thereby exceeding the scope of their employment. The Court disagrees.

The government as in Brumfield has filed a certification of scope of employment and moved to substitute the United States of America pursuant to 28 U.S.C. § 2679 as to any and all tort claims filed against the employees. In response to this, plaintiff states that the certification is improperly submitted but does not say why that is so. He then states that, "This is a motion to dismiss. Evidence is for later on." (*See* Plaintiff's Memorandum of Law in Opposition to Federal Defendants Frank S. Gattolin, Carl Dinwiddie and Daniel D. Campbell's Motion to Dismiss Plaintiff's Second Amended Complaint (Docket No. 35) at p. 6). He concludes by saying that in any event, the Second Amended Complaint shows that the acts of individual defendants were not in the scope of their employment.

The submission of the Affidavit and motion for substitution was attached to the individual defendants' brief in support of their motion to dismiss. As previously stated, plaintiff thinks this is improperly submitted, a proposition with which the court does not agree.

It is true, of course, that this is a motion to dismiss but the issue involving scope of employment and how it should be handled was thoroughly developed by the Third Circuit in Melo v. Hafer, 13 F.3d 736 (3d Cir. 1994). It is entirely appropriate, where as in this case, plaintiff relies on the allegations of his complaint, which to the extent they allege fact and not opinion, the court accepts as true, to make the determination of scope of employment on that basis.

The Third Circuit in Brumfield quotes the Restatement (Second) of Agency § 230 to explain that "an act, although forbidden or done in a forbidden manner, may be within the scope of employment." 232 F.3d at 381. The Brumfield court decided that government employees who provided false information during an internal government agency investigation were still acting in the scope of their employment. The court noted that it was "within the scope of Defendant's employment duties to cooperate with investigators...." Therefore, even though the employees provided inaccurate information, the overall activity was incidental to the employer's business and fell within the scope of the employment. Id.

In this way, Brumfield resembles the situation at bar. Here, Employees were merely operating within the range of responsibilities allocated to them. Therefore, even if Plaintiff's allegations about Employees are true, Employees would still be immune to suit. Moreover, even though the Government could be held liable for the actions of its employees, the nature of the claims in this complaint preclude liability. As discussed in more detail *infra*, Plaintiff's claims are barred by the FTCA because they arise out of alleged instances of defamation. The motion for substitution of the United States of America is granted.

2. Claims Against the United States of America[(2)]

The threshold issue in evaluating Plaintiff's claims against the United States is whether it is immune from suit for these causes of action. It is undisputed that the United States of America may not be sued unless it waives immunity through a Congressional statute. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980). Although the Government partly waived its immunity through the Federal Tort Claims Act, see 28 § U.S.C. 2671 et seq., it retained some exceptions including one which states that this waiver shall not apply to

"[a]ny claim arising out of...libel, slander...." 28 § U.S.C. 2680(h). Courts have treated claims for defamation and harm to reputation as encompassed by this provision. See, e.g., Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995) (granting defendant's motion for summary judgment where plaintiff's claim for defamation, slander and libel was based on allegations that a government agency published false information about plaintiff); D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983) (dismissing plaintiff's claim for harm to reputation on account of immunity under FTCA).

Plaintiff alleges Counts I, V, VII and VIII against the United States and Counts I through VIII, excluding Count VI, now by substitution, against the United States. With the exception of Count IV, each of these claims arises out of Plaintiff's allegation of defamation. Therefore, these claims against the United States are barred by the FTCA.

The Court begins its analysis by first examining Count III, the one specifically addressing defamation and trade libel, in order to understand the origin and nature of Plaintiff's complaint. In Count III, Plaintiff alleges that Defendants conducted an improper or flawed investigation through which they obtained and subsequently disseminated misleading information about Plaintiff's responsibility for the accident. Specifically, Plaintiff identifies statements regarding the qualifications and licensing of the airplane's pilot that Plaintiff contends depict him as a "careless and negligent pilot." Plaintiff explains his allegations stating that "[defendants] continued their conspiracy to defame the plaintiff and to falsify reports, tests and documents...which would humiliate and damage the plaintiff in his business, profession and reputation." Compl. ¶ 179.

Counts I and V reflect the alleged impact of these misrepresentations. Count I is for interference with business, professional and property rights. Plaintiff states that

"disclosure of such information to the public would impair the reputation of the plaintiff in the public's eyes, and would diminish the plaintiff's desirability, both as a lawyer and as a consultant." Compl. ¶ 175. Similarly, Count V is a claim for intentional infliction of emotional distress. Plaintiff contends Defendants' statements allegedly prevented him from working, diminished his "engagement by victims of aircraft accidents, in particular Alaska Airlines Flight 261," and subjected him to humiliation and criticism. Accordingly, the Court finds that these alleged harms arise out of and reflect the impact of Defendants' alleged defamation and libel.

Counts II and VII also derive from an alleged instance of defamation. Under Count II, Plaintiff contends that AlliedSignal and Employees violated RICO by transmitting information and documents through the mails that were "designed to mislead and deny certifying authorities adequate information upon which they could determine the cause of the plaintiff's accident." Compl. ¶ 159 (b). Plaintiff specifically alludes to the underlying defamation stating that AlliedSignal sought to "mislead the NTSB into not understanding how the fuel control and its amplifier worked, all for purposes of directing the NTSB's focus on the plaintiff, rather than the components of the aircraft as the cause of the accident, while knowing that the plaintiff was blameless." Compl. ¶ 170 (b).

Plaintiff's basis for Count VII is similar. Plaintiff states that "the entire purpose of the conspiracy and concerted action was to deprive the plaintiff and the NTSB of the knowledge of the reasons for failure...and it was for the purpose of humiliating, embarrassing, deprecating, hurting and impairing the plaintiff's ability to function..." Compl. ¶ 220. Essentially, Plaintiff is stating that the conspiracy's goal was achieved through the intentional publication of allegedly defamatory statements.

Finally, Plaintiff seeks equitable and injunctive relief under Count VIII on account of the harm caused by the alleged defamation. Again, this count depends upon a finding of defamation and arises out of this allegation.

As all of these counts contain injuries arising out of alleged defamation, they are all barred by the FTCA and the Court will dismiss all claims against the United States of America.

B. Count Brought Against Both AlliedSignal and Employees:

Equal Protection Under the Fifth Amendment

In Count IV, Plaintiff raises a claim which he labels "Denial of Equal Protection under the Fifth Amendment of the United States Constitution" where he argues violation of his due process rights, also under the Fifth Amendment. Although he does not bring this count against NTSB, he nonetheless contends that NTSB, Employees and AlliedSignal failed to comply with the proper administrative procedures in investigating Plaintiff's accident. Compl. ¶ 183. Specifically, Plaintiff explains that when Defendants threatened to release confidential information and disseminated inaccurate information, they harmed Plaintiff's reputation and violated his Fifth Amendment rights.

Plaintiff's claim fails, however, with respect to all defendants because Plaintiff does not allege injury to a protected interest, as required by the Fifth Amendment. Reputation is not a protected property or a liberty interest. See Paul v. Davis, 424 U.S. 693, 701-2 (1975). However, the Third Circuit has applied a "reputation-plus" test which recognizes a cause of action for harm to one's reputation where there is also a

"concomitant infringement of a protected right or interest." Esrek v. Twp of Springfield, 102 F. 3d 79, 83 (3d Cir. 1996).

The alleged harm to Plaintiff's reputation has been discussed *supra*. To satisfy the "plus" requirement, Plaintiff relies on Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 485 (1988), which established that a cause of action can be considered a constitutionally protected interest. Plaintiff contends that by threatening to disclose allegedly confidential information, Defendants forced Plaintiff to settle a lawsuit that he had brought against Fox TV Stations of Philadelphia, and thereby deprived Plaintiff of the cause of action. The Court disagrees with the premise of Plaintiff's argument because Defendants could not "require" Plaintiff to settle. Instead, Plaintiff's decision to accept the settlement offer was his rather than Defendants'. Accordingly, Plaintiff is unable to allege Defendants violated his constitutionally protected interest in this cause of action and therefore fails to establish this prong of the claim. Accordingly, the Court will dismiss this count.

C. Remaining Counts Against AlliedSignal

1. RICO

Plaintiff alleges AlliedSignal violated RICO during its participation in the NTSB investigation of Plaintiff's accident. To have standing to bring a claim under RICO, a plaintiff must allege injury to "business or property." 28 U.S.C. § 1964; see also Sedima, S.P..R.I. v. Imrex Co., 473 U.S. 479, 496 (1985). This injury must be specific or quantifiable. See Maio v. Aetna Inc., 221 F.3d 472, 495 (3d Cir. 2000) (providing a survey of cases where RICO claims were denied for insufficiently alleging injury). Additionally,

claims for personal loss are not covered by RICO. See Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987).

As Plaintiff's claims are primarily for personal humiliation and harm to his reputation, they are not actionable under RICO. Even where Plaintiff attempts to allege financial injury, his claims are vague and highly speculative. For instance, he contends that he lost "large sums of income" on account of this injury to his reputation. Compl. ¶ 165. These allegations are insufficient to establish a claim under RICO, and accordingly, the Court will dismiss Count II which contains Plaintiff's claims against AlliedSignal under RICO.

2. Defamation

To establish a claim for defamation under Pennsylvania law,[3] Plaintiff must allege and eventually prove the following elements:

(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of the statement's defamatory meaning; and (5) an understanding by the reader of listener of an intent by the defendant that the statements refer to the plaintiff.

Tucker v. Fishbein, 237 F.3d 275, 281 (3d Cir. 2001) (quoting 42 Pa. Cons. Stat. Ann. § 8343 (a)(1998)).

The Court believes that Plaintiff fails to make out the first prong of this analysis which requires Plaintiff to establish that Defendants' statements are capable of having a

defamatory meaning. See Tucker, 237 F.3d at 281. A statement is defamatory if it:

tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him [or her] in his [or her] business or profession.... [Or] if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Livingston v. Murray, 612 A.2d 443, 447 (Pa. 1992) (holding that an article discussing an athletic director's termination and the qualifications of potential replacements does not by the mere juxtaposition of the information impugn the former director's behavior or constitute defamation).

A communication is also defamatory if it ascribes conduct, character or a condition to an individual that would adversely affect his fitness for his business, trade or profession. See Rush v. Philadelphia Newspapers Inc., 732 A.2d 648, 652 (Pa. 1999). In deciding whether a statement is defamatory, the Court must consider the communication in context and determine whether "the effect [of the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Corabi v. Curtis Publ'g. Co., 273 A.2d 899, 907 (Pa. 1971) (quoted by the Third Circuit in Remick v. Manfredy, 238 F.3d 248, 261 (3d Cir. 2001).

All of the aforementioned counts that pertain to the alleged defamation involve the publication of allegedly inaccurate statements about the technical operations of the plane, the Plaintiff or his qualifications as a pilot. However, those comments specifically credited to AlliedSignal merely

address the mechanical failings of the aircraft and the potential maintenance defects. They do not reference the pilot or even suggest the possibility of pilot error and therefore the Court believes they are not capable of having a defamatory meaning.

However, Plaintiff asserts that these statements are intended to imply that the crash could have been avoided if the pilot had handled the situation more skillfully. Even assuming *arguendo* that Plaintiff is accurate in his assessment of AlliedSignal's intent, the import of the statements would only be discernible to an aviation expert. As Plaintiff's potential clients are often the families of victims of airline crashes, it is unlikely that their understanding of these technical areas would be sophisticated enough to grasp these subtle inferences. Additionally, as Plaintiff was never mentioned by name in the report, the potential clients, the media and the community in general would require more information than the report provided in order to derive any negative conclusions about Plaintiff. Accordingly, the Court does not find that the statements Plaintiff identifies are capable of having a defamatory meaning.

3. Intentional Infliction of Emotional Distress

In Count V, Plaintiff brings a claim against AlliedSignal alleging intentional infliction of emotional distress. Although the Pennsylvania Supreme Court has not expressly adopted this cause of action, the Third Circuit has held that it will consider this claim a legally viable one unless or until the Pennsylvania Supreme Court deems otherwise. See Dooley v. City of Philadelphia, No. 99-2764, 2001 U.S. Dist. LEXIS 7437, *83 (E.D. Pa. June 4, 2001). A claim for intentional infliction of emotional distress requires conduct to be "so extreme in nature as to go beyond all possible bounds of decency such that it would be regarded as utterly intolerable to a civilized society." Mulgrew v. Sears Roebuck & Co.,

868 F. Supp. 98, 103 (E.D. Pa. 1994). Even accepting *arguendo* Plaintiff's most grave allegations of defamation, embarrassment or harm to his professional reputation, the Court cannot find that this conduct reflects indecency or rises to the level necessary for this claim. Accordingly, this count for intentional infliction of emotional distress will be dismissed.

4. Obstruction of Justice and Lying to a Federal Agency

In Count VI, Plaintiff brings a claim against AlliedSignal labeled "Obstruction of Justice and Lying to a Federal Agency" in which he alleges that AlliedSignal deliberately interfered with a government agency investigation by lying to NTSB. However, Plaintiff does not identify the legal basis of his cause of action. Instead he broadly asserts that "[i]t is unlawful to lie to a federal agency, especially when such conduct would obstruct an investigation of an accident or be in furtherance of a criminal enterprise or conduct." Compl. ¶ 211.

In his brief opposing AlliedSignal's motion to dismiss, Plaintiff seems to offer two theories to support this claim. First, Plaintiff contends that an implied private right of action exists under a federal statute. However, he does not identify the statute. The Court generously interprets Plaintiff as intending to ground this claim in RICO. Under RICO, Plaintiff asserts that AlliedSignal aided and abetted other defendants in misleading the FAA and was not honest in its disclosures to the aviation industry. Compl. ¶ 163, 164. Despite these allegations, Plaintiff's apparent effort to derive a private cause of action from RICO fails because the Third Circuit explicitly refused to acknowledge such a cause of action for aiding and abetting under this statute. See Pennsylvania Ass'n of Edward Heirs v. Rightenour, 235 F.3d 839, 840 (3d Cir. 2000).

AlliedSignal offers an alternative interpretation of Plaintiff's statutory authority, suggesting that Plaintiff may have intended to derive a private cause of action from either 18 U.S.C. § 1503, which prohibits obstruction of justice, or 18 U.S.C. § 1623, which prohibits false declarations in a judicial proceeding. However, both of these statutes create criminal penalties not civil ones and accordingly, federal courts have not recognized a private cause of action under them. See, e.g., Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). Consequently, Plaintiff's claim fails under this theory.

Plaintiff raises a second potential theory on which to base this claim, explaining that AlliedSignal has committed an "intentional tort" or "prima facie tort" as established under Section 870 of the Restatement (Second) of Torts. Plaintiff, however, made no reference to this theory or its specific elements in his pleadings and therefore the Court does not consider them adequately pled. Accordingly, in the absence of any viable theory on which to base this count, the Court will dismiss it.

5. Civil Conspiracy

In Count VII, Plaintiff brings a claim against AlliedSignal alleging conspiracy based upon the republishing of false and damaging information and deprivation of constitutional rights. The first of these torts is addressed *supra* under the claim for defamation. Similarly, the second is considered *supra* in the discussion of Count IV. As a claim for civil conspiracy requires a predicate tort action and neither of these claims survive the motion to dismiss, Plaintiff's claim for conspiracy also fails.

6. Equitable Relief and Injunction

Finally, in Count VIII, Plaintiff brings a claim for equitable relief and an injunction. As Plaintiff failed to successfully

allege any claims against AlliedSignal, the Court has no basis on which to grant relief. Accordingly, Plaintiff's claim under Count VIII is also dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are hereby GRANTED and Plaintiff's complaint is DISMISSED in its entirety. Plaintiff's claims against the Government, the NTSB, the Ten (10) Unknown Employees and AlliedSignal are all dismissed. In addition, any claims in this action brought against the three named NTSB employees, Frank S. Gattolin, Carl Dinwiddie, and Daniel D. Campbell, are also dismissed. This case is hereby CLOSED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK, :

:

Plaintiff, : CIVIL ACTION

: No. 00-CV-6394

UNITED STATES OF AMERICA, :
NATIONAL TRANSPORTATION :
SAFETY BOARD, TEN :
UNKNOWN NTSB EMPLOYEES, :
ALLIEDSIGNAL INC. and :
HONEYWELL INTERNATIONAL, :
INC., :
Defendants. :

ORDER

AND NOW, this 25th day of October, 2001, it is hereby **ORDERED**:

(1) Upon consideration of the Motion of Defendants United States of America, National Transportation Safety Board, and Ten (10) Unknown NTSB Employees In Their Official

Capacities To Dismiss Second Amended Complaint (Docket No. 14), Plaintiff's response thereto (Docket No. 22), and Defendants' reply (Docket No. 29), Defendants' motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against these defendants.

(2) Upon consideration of the Motion of Defendants AlliedSignal, Inc. and Honeywell International Co. to Dismiss Plaintiff's Second Amended Complaint (Docket No. 15), Plaintiff's response thereto (Docket No. 23), and Defendants' reply (Docket No. 33), Defendants' motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against these defendants.

(3) Upon consideration of the Motion of Federal Defendants [sic] Frank S. Gattolin, Carl Dinwiddie, and Daniel D. Campbell to Dismiss [sic] Second Amended Complaint (Docket No. 34), Plaintiff's response thereto (Docket No. 35), and Defendants' reply (Docket No. 36), Defendants' motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against these defendants.

IT IS SO **ORDERED** that Plaintiff's Complaint is **DISMISSED** in its entirety. This case is hereby **CLOSED**.

BY THE COURT:

/s/

RONALD L. BUCKWALTER, J.

BEST AVAILABLE COPY

1. These individuals are: Frank S. Gattolin, Carl Dinwiddie and Daniel D. Campbell. Plaintiff states in his brief opposing Defendant's motion to dismiss that he sued "Ten Unidentified Employees of the NTSB and was compelled to serve someone, so he served three individual NTSB employees known to him." Pl. Br. at 2.

2. A lawsuit complaining of a federal government agency's conduct should be brought against the United States government rather than the agency itself. See, e.g., Sarraga v. Girod Vela & Co., Inc., 649 F. Supp. 11, 12-13 (D.P.R. 1986). Plaintiff's complaint names the United States of America as a party and lists the NTSB beneath it. Accordingly, the Court construes Plaintiff's suit only to be against the United States of America.

3. Appropriately, both parties apply Pennsylvania law.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-4112

ARTHUR ALAN WOLK,
Appellant,

v.

UNITED STATES OF AMERICA, NATIONAL TRANSPORTATION SAFETY BOARD, TEN UNKNOWN NTSB EMPLOYEES, ALLIEDSIGNAL, INC. and HONEYWELL INTERNATIONAL, INC.,
Appellees.

SUR PETITION FOR REHEARING EN BANC

BEFORE: BECKER, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES Circuit Judges, WEIS* and DUHE* Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

IT IS SO ORDERED.

By the Court,

/s/_____

Dated: September 30, 2002 Circuit Judge

*Judges Weis and Duhe's vote is limited to panel rehearing only.

28 U.S.C. § 2679 provides:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or

proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title,

such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.. [FN1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR ALAN WOLK 1710-12 Locust Street Philadelphia, PA 19103	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA, National Transportation Safety Board 490 L'Enfant Plaza East, S.W. Washington, DC 20954	:	
and	:	JURY
TRIAL DEMANDED	:	
TEN UNKNOWN NTSB EMPLOYEES National Transportation Safety Board 490 L'Enfant Plaza East, S.W. Washington, DC 20954	:	
and	:	
ALLIEDSIGNAL INC. 101 Columbia Road Morristown, NJ 07962	:	
and	:	
HONEYWELL INTERNATIONAL, INC. 101 Columbia Road Morristown, NJ 07962	:	
00-CV-6394	:	NO.

SECOND AMENDED COMPLAINT

The Parties

1. Plaintiff, Arthur Alan Wolk, is an individual, citizen and resident of the Commonwealth of Pennsylvania, with his office address at 1710-12 Locust Street, Philadelphia, Pennsylvania.

2. Defendant, United States of America, is a body politic organized under the laws of the United States, and for purposes of this litigation operates through its executive branch, an agency of government known as the National Transportation Safety Board ("NTSB"), established by the Independent Safety Board Act of 1974, with its principal place of business at 490 L'Enfant Plaza East, S.W., Washington, DC.

3. Ten unknown NTSB employees are individuals, all employed by the defendant, NTSB, who acted individually and in concert to deprive the plaintiff of rights guaranteed by the Constitution and laws of the United States.

4. Defendant, AlliedSignal Inc. ("AlliedSignal"), is a corporation organized and existing under the laws of the

State of Delaware, with its principal place of business located at 101 Columbia Road, Morristown, New Jersey.

5. Defendant, Honeywell International, Inc. ("Honeywell"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 101 Columbia Road, Morristown, New Jersey

Jurisdiction

6. Jurisdiction of the within court is invoked pursuant to 28 U.S.C. §§ 1331 and 1337 of the Federal Tort Claims Act, and 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and pursuant to 28 U.S.C. § 1367, the doctrine of supplemental jurisdiction. In the alternative, jurisdiction is invoked pursuant to 28 U.S.C. § 1332 due to the complete diversity of citizenship among the parties, the amount in controversy being certified to be in excess of $100,000, exclusive of interest and costs.

Venue

7. Venue is proper pursuant to 28 U.S.C. § 1290 in that the damages to the plaintiff by the National Transportation Safety Board occurred here, the remaining defendants do business within this District by frequently sending representatives, selling parts and have business locations here.

Background

8. The plaintiff is an aviation lawyer. That means for the past thirty years plaintiff has for the most part specialized in the handling of airplane crash cases for the families of those killed or injured. To that effort he has brought qualifications as a pilot, which include an Airline Transport Pilot's Certificate, a Letter of Authorization to fly the Panther Jet Fighter, and a host of other related ratings and certificates, including Low Level Aerobatics, and Airshow Formation qualifications.

9. As a result of the plaintiff's profession, he has personally and with consultants investigated hundreds of

aircraft accidents involving large and small aircraft. This effort has included actual examinations of aircraft hardware, experimentation with aircraft components to ascertain failures, and flight-testing of aircraft.

10. Because of that effort and his success both in and out of the courtroom, plaintiff has been sought after by news media to comment on the causes of aircraft accidents and has correctly called the cause of every major airline disaster within hours of its occurrence. Recognition from Larry King of CNN of plaintiff's ability in this regard is attached and marked (Exhibit "1"). Thus, plaintiff has been treated as an aviation expert by virtually all the news media, print and electronic, and as a consequence has been sought after by victims' families to represent them following crashes.

11. This ability on the part of the plaintiff angered employees of the NTSB, who were both embarrassed and annoyed that they could spend years "investigating" accidents and not come up with the correct cause, while some

lawyer was able to do so consistently. This resulted resentment within both NTSB Headquarters and its regional offices.

12. In 1985, plaintiff purchased a Korean War vintage jet fighter, a Grumman F9F-2 Panther. Under the Federal Aviation Regulations then in existence, the plaintiff, following direction from the Allentown Flight Standards District Office ("FSDO") of the Federal Aviation Administration ("FAA"), took training in an aircraft of similar performance because there was no two-seat derivative trainer of the Panther jet. That aircraft was a DeHavilland Vampire, a two-seat trainer equipped with a Rolls Royce engine of approximately 3500 pounds thrust and a takeoff weight of about 10,000 pounds. The Panther was equipped with a Rolls Royce Nene jet engine of 5000 pounds thrust and takeoff weight was approximately 16,000 pounds. The thrust-to-weight ratio of both aircraft was similar, the engine response of both aircraft was similar, the engines in both were of the same vintage, and the controls in both aircraft

were similar. Thus, the FAA determined that training in the Vampire would be an equivalent level of safety of a two-seat Panther, if there were one. (Exhibit "2").

13. Following the receipt of confirmation of satisfactory training in the Vampire, the Allentown FSDO, in 1985, authorized the plaintiff to fly the Panther where it was in Pontiac, Michigan, and later to fly it home to Allentown, Pennsylvania, where it would be based. (Exhibit "3").

14. Upon bringing the Panther to Allentown, the FAA FSDO issued a letter authorizing practice flights. (Exhibit "4"). Subsequently, the plaintiff presented his credentials to Daniel Caris, the Operations Inspector assigned by the Allentown FSDO for oral and flight examination, which examination was completed successfully resulting in a Letter of Authorization ("LOA") to be issued to the plaintiff by the FAA on November 7, 1985. (Exhibit "5").

15. During the ensuing year, the FAA observed the plaintiff fly the Panther, as the FSDO was located at the airplane's home base, and at airshows. One year later, on

November 14, 1986, the FAA FSDO at Allentown reissued the LOA. (Exhibit "6"). It also issued a low level aerobatic waiver permitting plaintiff to perform aerobatic maneuvers at or above 400 feet from the surface during airshows. The FAA also removed the VFR-only flight restriction, allowing the plaintiff to fly the Panther under actual IFR conditions.

16. During the ensuing year, the FAA observed the plaintiff fly the Panther both at its home airport and at airshows and issued a permanent LOA without requiring yearly renewal. It also reissued the plaintiff's low level aerobatic waiver. By this time, the plaintiff had logged about fifty hours in type. (Exhibit "7").

17. During each of the nine years that followed, the FAA inspected the plaintiff's performance at airshows and reissued his low level aerobatic waiver. In fact, in June of 1996, the year of plaintiff's accident, the FAA flew with the plaintiff in formation and issued his air-show formation qualification. (Exhibit "8").

18. For eleven years as a jet pilot, not one person ever challenged the validity of the LOA, nor did anyone suggest even for a minute that the plaintiff had not met every requirement imposed upon him by the FAA for that certificate. In thirty years of flying, the plaintiff never once had even a hint of violation or criticism of his flying qualifications or abilities by the FAA or anyone else. In fact the FAA, through its Headquarters, confirmed as late as May 8, 1998 that plaintiff was and is the holder of a valid, legal and fully compliant LOA in the F9F-2 Panther. (Exhibit "9").

The Aircraft

19. When the plaintiff purchased the Panther in 1985, the logbooks reflected that the fuel control had been overhauled in 1983. There were, however, continuing operational problems with the fuel control, including start problems and events of the fuel control going into "emergency" on its own, especially during slow or no starts. These were troubleshot repeatedly and the fuel pumps were

replaced and overhauled. The fuel control was removed at least twice for testing and repair, and the amplifier of the fuel control removed and sent for repair twice.

20. Each time these components were serviced, evidence of such was entered into the aircraft maintenance documents. The engine logbook was too small, so a maintenance loose- leaf folder was established into which the reliable record of aircraft maintenance was put.

21. During an air-show at Kalamazoo, Michigan in June of 1995, the engine would not start. A call was made to Aero Turbine, the company that purportedly overhauled the fuel control and performed all the subsequent fuel control maintenance. Doug Clayton of that company said to remove the amplifier from the fuel control, a little half-bearing was probably out of position, reposition it and the engine will start. The instructions were followed, the half bearing reinserted and the engine worked fine until the end of the show, after which the amplifier, fuel control and fuel pumps were returned to Aero Turbine for repairs. The plaintiff was

assured that the repairs were made, and the components were returned and reinstalled to little avail. The amplifier was returned again, this time with replacement parts and, once again, it was returned as fixed. Because the engine still did not run correctly, adjustments were made in the field to the fuel control at the recommendation of Aero Turbine. While the engine started and ran better, it still wasn't like it used to be. Aero Turbine, when queried, said all was well. The records showed that after the purported overhaul by Aero Turbine of 1983, the fuel control and fuel pumps were back to Aero Turbine for repairs at least three times, the last being just three months before the accident. In 1989, the fuel control and pumps were returned due to another engine failure on takeoff, that time from the Manchester, New Hampshire Airport. (Exhibit "10").

22. On September 19, 1996 at around 5:00 P.M., the plaintiff embarked on a long cross-country flight from Kalamazoo, Michigan to NAS Oceana the first flight after fuel control adjustments. The aircraft had been fueled with

fifty gallons of 100LL aviation gasoline and 200 gallons of Jet A jet fuel. That fuel was put into the main tanks located in the fuselage and the wing tips. This mixture, recommended by Aero Turbine back in 1985, was designed to avoid a build-up of carbon in the burner cans of this centrifugal flow engine, which causes premature cracking of the cans. It was for no other reason, and that mixture worked successfully and without incident in the Panther and countless other jet warbirds. Jet A would burn just as well without any noticeable difference in performance or temperature, and the carbon tracking problem occurred when either JP-3, JP-4 or Jet A was used, but was greatly diminished when the Avgas mixture was used from time to time. The Avgas mixture was not necessary every fill up, and some pilots mixed Avgas in only infrequently to burn off the carbon, something that the Navy accomplished aboard ship when the Panther first entered service by using 115/145 Avgas and 10-10 oil to fuel the aircraft. This aircraft was never fueled with eighty percent Avgas and twenty percent

jet fuel in the eleven years owned or flown by the plaintiff, nor is there any fuel order, fuel slip or any other document in existence that would support that suggestion. The fuel slip from Kal Aero for the day of the accident was never requested by the NTSB investigator at any time, but was supplied by the plaintiff after the first narrative. It shows the fuel mixture to be seventy-five percent Jet A and twenty-five percent 100LL. Since the tip tanks had some fuel and only hold 120 gallons each side, the two hundred and fifty gallons were put into both the tip tanks and the mains, as was plaintiff's instruction and practice. (Exhibit "11").

The Accident Flight

23. The aircraft was pre-flown and started. Although it started faster than before, it still wasn't perfect but it seemed otherwise to run okay. Taxi and pre-takeoff checks were completed and instrument clearance received. The take-off took a little longer due to the outside

temperature of eighty-five degrees and the maximum fuel load.

24. As plaintiff reached for the landing gear handle, a marked deceleration was felt, although the engine instruments looked normal. The airspeed stuck at approximately 120 knots so, believing there was an engine, pitot (a tube on the wing that allows air to enter the airspeed indicator in the cockpit) or two problems, plaintiff turned to remain in the traffic pattern, called Air Traffic Control and noted his problem and decided to return for landing.

25. As the power lever was retarded, the engine did not slow normally and a light (most probably the Emergency Fuel Control light) was seen. Since this indication was that a flameout was likely and the engine unreliable, as was the airspeed indicator, a decision to use the Operating Manual engine out procedure was selected.

26. The engine was shut down, the aircraft maintained at what was thought to be in excess of 150 knots airspeed (estimated only), and a completely successful engine

out landing was made a third to halfway down the runway. (Exhibit "12").

27. The brakes were applied, overheated and faded almost immediately. To apply the emergency brake, however, would have certainly resulted in blown tires and even less stopping distance and aircraft control, a circumstance to be avoided. (Exhibit "13").

28. Rather than crash into the approach light standards at the end of Runway 35, plaintiff elected to turn right off the runway onto the grass. The aircraft continued up a hill, struck a berm, became airborne again crossed a highway and crashed into a hill bursting into flame.

29. Rescue personnel put out the ground fires and extracted plaintiff, who suffered a badly broken back, broken right arm and multiple lacerations and a closed head injury. The plaintiff was hospitalized and extensive back surgery performed.

The First NTSB Investigation

30. The NTSB assigned Frank Gattolin from the NTSB's Chicago field office as its investigator in charge, and the FAA assigned Daniel Caris.

31. Daniel Caris was the FAA Operations Inspector at the Allentown FSDO in 1985 assigned the job of testing the plaintiff for his LOA in the Panther and had recommended the issuance of the LOA in accordance with the then existing FAA regulations and FAA Inspector's Handbook. Mr. Caris was also the very FAA Airshow Monitor who saw claimant fly both before he left Pennsylvania for the FAA in Michigan and at a number of airshows at Kalamazoo Michigan.

32. The plaintiff was interviewed the first time while in the hospital, either shortly before or after his surgery. Plaintiff was on a morphine pump and the investigators were told: "He was just talking about Dr. Seuss, but you can interview him." Nonetheless, at that time, the plaintiff mentioned both the airspeed indicator sticking and the fuel control problem.

33. The NTSB's first investigation was careless, reckless, negligent, violative of its own procedures, regulations and training in that:

a. The NTSB asked only for the claimant's logbook referable to flylets in the Panther never once asking for either the complete reliable record of plaintiff's training, flight experience, flight testing or the LOA or training records.

b. The NTSB never once asked Mr. Caris whether the claimant was indeed properly issued his LOA in accordance with the then existing FARs and FAA Operations Inspector's Handbook.

c. The NTSB never once called or wrote the FAA Allentown FSDO to determine whether the claimant had been properly issued his LOA.

d. The NTSB IIC never had any prior warbird investigation experience and never knew what requirements for issuance of an LOA were.

e. The NTSB IIC never requested the fuel slip for the last fueling or any other fueling from Kal-Aero.

f. The NTSB never x-rayed or disassembled the fuel control despite having been told of the amplifier problem.

g. The NTSB never examined nor disassembled the airspeed indicator to confirm the position of the needle at time of glass breakage, which was during claimant's extraction from the aircraft.

h. The NTSB investigator was not a jet pilot.

i. The NTSB never once asked for the maintenance documents for the engine or fuel control.

j. The NTSB ignored the existence of Fuel Control manufacturer's lead seals on the fuel control, which meant the alleged overhaul, and subsequent repairs by Aero Turbine never could have been made.

k. The NTSB ignored the requirements of its own investigation training manual with respect to determining and verifying instrument position at impact.

l. The NTSB ignored the Panther flight manual instruction with respect to conducting a flameout approach with respect to assessing and dealing with unreliable engine performance, using the emergency brake and handle and emergency procedures.

The First NTSB Narrative

34. Without consulting with or asking the plaintiff for a review of the narrative for correctness, as is typically done, the NTSB published its first narrative of the accident on the Internet, and its contractor sent several copies to requestors. (Exhibit "14").

35. Upon seeing the narrative and recognizing its gross mistakes, plaintiff immediately notified the NTSB and its Chairman, James Hall, and documented the mistakes.

36. The report was pulled from the Internet, the mistakes acknowledged, letters sent to the requestors to ignore it, and a letter of apology was received from the NTSB. (Exhibit "15").

37. One of the most egregious errors acknowledged by the NTSB was that plaintiff was not properly licensed to fly the Panther, which came not from an investigation but rather from a reporter from Fox News in Philadelphia who was totally uninformed about the subject. That error was acknowledged by then NTSB counsel, as well as the Chairman, and a new set of NTSB investigators were assigned to reinvestigate the accident.

38. The Chicago office of the NTSB was chastised for work inconsistent with NTSB policies and procedures, and the procedures supposedly changed to avoid a repetition, or so the plaintiff was told. NTSB counsel also told the plaintiff that the Chicago office resented the plaintiff. A letter dated May 28, 1999 by NTSB counsel to the plaintiff promised these inaccuracies would be fixed. (Exhibit "16").

39. In the plaintiff's letter to the NTSB of May 25, 1999, (Exhibit "17"), the Chairman was cautioned that a repeat of the NTSB's inaccurate and unfair treatment would "...damage and destroy the work I have done for thirty years to improve aviation safety...." and further that such mistakes would cause irreparable harm to the plaintiff.

40. The Chairman appointed three individuals to rework the investigation: a former Navy pilot who was senior with the NTSB (and who started the investigation into United 585, but was pulled off when he got too close to blaming the rudder before USAir's 427 killed another 132 people), and a former Eastern Airlines Captain, and Pierre Scarfo, a former Navy engine maintenance technician.

41. A former Bendix (now Allied Signal/Honeywell) fuel control expert hired by the plaintiff was offered but declined by the NTSB.

42. The earlier NTSB investigator, had been quick however to enlist the services of the defendants AlliedSignal, now Honeywell, to pronounce the fuel control fully

functional, without properly investigating its maintenance history and without dismantling or X-raying it to verify plaintiff's claim of the half ball metering valve's failure.

43. These new investigators met with the plaintiff several times and concluded the following:

a. Plaintiff was properly certified and his LOA properly issued by the FAA.

b. Plaintiff properly handled the emergency he was faced with the likely cause being air in the fuel pumps.

c. Plaintiff used the appropriate fuel for the aircraft and his flight operations were in accordance with the Navy flight manual under the circumstances.

44. These investigators unanimously presented to the plaintiff a new narrative based upon their joint reinvestigation of the facts of the accident and their own factual conclusions made independently. (Exhibit "18").

45. That narrative was substantially correct, supported, with exceptions, by the facts and agreed by all three to be the narrative of the accident.

46. The only factual discrepancies were that the x-ray of the fuel control amplifier supplied after the last narrative by the plaintiff was not referenced nor was the mark on the face of the airspeed indicator at 123 knots mentioned.

47. Not a single investigator ever once suggested that plaintiff was not properly certified or did not qualify for his LOA. Indeed, the opposite was agreed and put into the narrative by them, just as it was agreed by NTSB counsel after the first narrative was withdrawn and by the FAA Headquarters.

The Second NTSB Narrative Blunder

48. On Christmas Eve, 1999, plaintiff learned the NTSB narrative was back on the Internet, and on Christmas Day, the plaintiff read the new narrative. (Exhibit "19").

49. It was completely at odds with the narrative the three new NTSB investigators had prepared as a result of their investigation. It repeated the factual mistakes of the first narrative and was, like the original narrative, false in a number of material respects:

a. The NTSB again concluded falsely that plaintiff was using 80% Avgas and 20% Jet A, when the fuel slip showed that the percentage was 75% Jet A and 25 % Avgas. It also concluded that the fuel was put only in the tip tanks, which would have been impossible, as the tips hold only two hundred forty gallons total and they had fuel in them.

b. The NTSB again concluded falsely that plaintiff did not meet the requirements of issuance of his LOA in the Panther when the three investigators, NTSB counsel, the Chairman, FAA Headquarters and the FSDO that issued it concluded otherwise. What was even more negligent is the continued reliance on a FAA Inspector's Handbook criteria for the issuance of LOAs, which did not

exist in 1985! When the FAA itself had confirmed that the plaintiff was fully licensed.

c. The NTSB again claimed the plaintiff's 1985 LOA from the FAA was not available when, in truth, it was never asked for, but was made available to the NTSB following the first narrative debacle.

d. The NTSB again falsely concluded that training records were not provided when, in truth, training records in a T-33 jet trainer and the De Havilland Vampire were provided, but not mentioned.

e. The NTSB again falsely concluded that the plaintiff had one hour of ground training in the aircraft, when it was provided with a videotape of ground training and logbook entries showing two days of it, in addition to the a one hour telephone call to Chuck Sewell six Grummans' chief text plot.

f. The NTSB again deliberately quoted inapplicable sections of the Pilot's Handbook for the Panther

that were intended to criticize the plaintiff for an inapplicable phase of the accident flight:

g. The NTSB referenced light bulb filament stretching to suggest an emergency fuel control light was not on when, had they understood the fuel control, they would have realized that when plaintiff shut the engine down, the emergency fuel control light went out.

h. The NTSB referenced low hydraulic pressure to suggest plaintiff's improper preflight when, in fact, the canopy emergency release blew the hydraulic lines aft of the cockpit, releasing hydraulic pressure which, because of the original investigator's gross negligence, was never investigated.

i. The NTSB suggested that the engine logbook was somehow deficient because it referenced no fuel control maintenance after the alleged overhaul of 1983. In fact, the NTSB was provided with a loose leaf binder with the fuel control maintenance documents which was used

because the engine logbook was too tiny to put the records in. These records were furnished to all investigators.

j. The NTSB referenced the emergency brake T-handle position to suggest the pilot improperly failed to pull it to activate the emergency brake, even though the brakes were working. The T-handle is for brake failure, as in-hydraulic brake failure, and is contraindicated by the flight manual because activation will blow tires and cause loss of control, and would result in less not more braking. Flight Manual Page 50. (Exhibit "20").

k. The NTSB made reference to no documentation being provided of training in a Lear 24 by plaintiff. No request was ever made, but was furnished. It was, in fact, a Lear 25, and it was 2½ hours of dual received, not just 2. (Exhibit "21").

The Fox Broadcasting Lawsuit

50. Subsequent to the first narrative, plaintiff spoke with NTSB counsel and told him that the errors in the

narrative, especially the completely false reference to the issuance of the LOA, would damage the plaintiff in a lawsuit brought against Fox News in Philadelphia arising out of a defamatory broadcast following the crash.

51. Fox News had requested under FOIA certain NTSB accident investigations files, which were not part of any public docket as none had been established, had been furnished in confidence by plaintiff in the investigation, and were normally not produced by the NTSB as part of its policy of protecting the work in process product of the NTSB.

52. Fox sued the NTSB, in response to which NTSB counsel told Joel Ryan, the new plaintiff's counsel, that he intended to produce everything the NTSB had. Even though cautioned by Ryan that NTSB policy prohibited it, and even though the NTSB had pulled its erroneous narrative from the Internet and agreed it was false, NTSB counsel, undaunted by the law or policy, sought to quickly disclose

the materials to Fox so the latter could use the same in its litigation against the plaintiff.

53. A lawsuit filed by the plaintiff against the NTSB for reverse FOIA protection delayed that production and the Fox case settled in a fraction of its value due to the NTSB's threat of disclosure, but not without the expenditure of huge amounts of legal time and effort, and the suffering of huge amounts of emotional pain, and loss of the value of the case.

54. After the Fox FOIA lawsuit was filed plaintiff became aware for the first time that the NTSB was communicating with defendant AlliedSignal/Honeywell concerning the fuel control from the plaintiff's aircraft.

55. For the first time, plaintiff became aware that there had been a continuous stream of communication with AlliedSignal/Honeywell from November 20, 1996 through December 2, 1996, July 29, 1997, January 10, 1997, July 27, 1998, October 16, 1998, none of which information nor

report were known to the plaintiff until after the NTSB agreed to produce the same to Fox News.

56. This "break your neck" effort by NTSB counsel and others unknown to plaintiff to assist Fox News and to damage the plaintiff was in the face of a NTSB letter to lawyers litigating the USAir 427 accident that the NTSB prohibited such discovery. (Exhibit "22"). This NTSB practice continues unobstructed to this day with a similar letter sent to lawyers in Alaska Airlines and the Boeing Company litigating the crash of Alaska Air 261. Only the plaintiff was singled out for "special" treatment.

57. The result of the NTSB's first published narrative, and the threat of production of the erroneous materials to Fox News in its FOIA litigation, resulted in plaintiff have to settle its Fox libel suit for a fraction of its value.

AlliedSignal/Honeywell Deliberate Misleading of the NTSB

58. Following the crash, the plaintiff advised the NTSB of a long history of malfunctions of the fuel control of the aircraft's engine.

59. These fuel control malfunctions had resulted in at least one emergency landing as a result of partial engine failure, many failed starts and hung starts, and the ultimate malfunction that resulted in the crash on September 19, 1996.

60. Unbeknownst to the plaintiff following the crash, the NTSB consulted with AlliedSignal/Honeywell and made it a party to the investigation for purposes of "assisting" the NTSB in understanding and testing the fuel control.

61. In spite of the defendant AlliedSignal/Honeywell's actual knowledge of the maintenance history of the fuel control and that a fuel pump modulation device consisting of a half ball bearing in the amplifier section of the fuel control had previously come loose, resulting in non-starts, defendant AlliedSignal/Honeywell, for the sole purpose of protecting

itself from potential litigation (which was neither threatened or intended by the plaintiff) consistently, deliberately and deceitfully misled the NTSB about the operation of the fuel control, as well as the amplifier section of it.

62. For example, by letter dated November 20, 1996, AlliedSignal/Honeywell, through John Loring, stated the start problems were due to the batteries because "battery starts do not always have enough engine wind up to sustain start schedule." (Exhibit "23").

63. This statement is false, deliberately false, careless and reckless because defendant AlliedSignal/Honeywell did not attempt to determine the start modifications made to the aircraft, which consisted of the installation of three batteries, not one, sufficient relays so that they could be sequenced in the start process, and had more than enough battery power to start the engine. Indeed, this was the only Panther jet ever built with such a start system, and never required the use of an auxiliary power unit to successfully start the engine.

64. The purposes of this statement was to deflect the NTSB's inquiry as to whether the defects in the fuel

control could have resulted in the start problem that the plaintiff had experienced repeatedly during the period of ownership of the aircraft.

65. Mr. Loring of AlliedSignal also stated in the same letter that, "Going into emergency increases fuel flow for any given throttle angle. Therefore, any deceleration of the engine is not from going into emergency."

66. That statement was false. The going into emergency of the fuel control increases the fuel flow to the extent that the emergency fuel flows have been adjusted properly. To the extent that the fuel flows have not been adjusted properly, or if the fuel pump and for fuel control are not functioning properly, the transfer from normal operation to emergency will result in a change in engine operation, which can include anything from acceleration to deceleration.

67. The statement was false, and intended to deflect further investigation by the NTSB investigator.

68. Mr. Loring of AlliedSignal also stated, "Therefore the scenario that the if the halfball were stuck open would not increase fuel flow (increase pump stroke), but in fact would reduce pump stroke in fuel flow. Also if

the halfball were stuck open (cocked) it would only require a new slightly different throttle position to correct."

69. This statement was false, deliberately false, and intended to mislead the NTSB in that the half ball could not become cocked unless the cradle in which it rested were broken. Second, the throttle position could not be increased to compensate for the loss of pump pressure because the throttle was already at maximum at the stop on takeoff. Finally, the cocked half ball would result in a reduced pump stroke and fuel flow, which is the deceleration experienced by the plaintiff. Defendant AlliedSignal/Honeywell, however, never brought that to the attention of the investigator in an attempt to mislead him and, therefore, protect itself from potential litigation.

70. Finally, Mr. Loring stated, "A request for increase pump stroke would cause the cocked half ball to make contact with the orifice and would straighten out the half ball."

71. This statement was only a half-truth because if the half ball's cradle were broken, as it was, the half ball

would not straighten out, as a consequence of which nothing the pilot could do would change the engine operation.

72. On December 2, 1996, the same John Loring of AlliedSignal deliberately misled the NTSB's Frank Gattolin by responding to the statement of a former Bendix consultant hired by plaintiff, Donald Hamill, and in responding to Mr. Hamill's November 12, 1996 report, a copy of which is attached and marked (Exhibit "24").

73. On December 2, 1996, Mr. Loring of AlliedSignal stated to the Board, "The amplifier has nothing to do with the start schedule." (Exhibit "25").

74. That statement was false, deliberately false, and intended to deflect the Board's investigation of the accident. In truth and in fact, the amplifier plays a role in starting the engine in that it operates and controls the fuel pump such that if the half ball is cocked or has fallen out of its amplifier position, the fuel pumps will be unable to continue and complete the start process for the engine.

75. The purpose of the statements of AlliedSignal/Honeywell to the Board that were false and deliberately false was to deflect the focus of the investigation

from AlliedSignal/Honeywell's defective fuel control and the long history of start problems, together with the actual finding of the amplifier half ball being out of position at a time when the engine did not start. Replacing the half ball in position resulted in an immediate restart of the engine. Thus, AlliedSignal/Honeywell's false statements to the NTSB were just that – false.

76. In the same letter, AlliedSignal/Honeywell stated to the Board, "The half ball aligns itself to be square to the Ps orifice when in the closed position. Had the half ball become stuck in a cocked position as proposed, a demand for increased pump stroke would straighten the halfball out."

77. That statement was false. In truth and in fact, as AlliedSignal knew or had to know, the broken tangs that support the half ball would prevent the half ball from straightening out and result in a continuous failure to have adequate pump strokes sufficient to start the engine or, indeed, would result in the loss of power experienced by the plaintiff on takeoff.

78. AlliedSignal also stated, "Hamill's [plaintiff's fuel controls expert and former Bendix/AlliedSignal

employee] scenario that the amplifier half ball (cocked) dropped the pump stroke enough that the fuel control system went into emergency mode causing an immediate apparent loss of power. This, while at throttle power range. This is impossible." T his statement is false, knowingly false, and was made by AlliedSignal/Honeywell for purposes of continuing to deflect investigation from its own product.

79. On January 10, 1997, AlliedSignal/Honeywell, by its litigation support personnel, David W. Dodson, euphemistically known as "Product Safety & Integrity", wrote to the NTSB that, "In conclusion, it is the unanimous opinion of the AlliedSignal technical experts that these units perform to specification and that the engine and its controls were capable of sustained operation in the aircraft throughout the entire operational envelop." (Exhibit "26").

80. This statement was false, completely false, and intended to further deflect the NTSB's investigation of the failure of AlliedSignal/Honeywell's fuel control in this accident.

81. In truth and in fact, AlliedSignal/Honeywell never disassembled the fuel control, never disassembled the amplifier, never examined the tangs that support the half ball, never examined the half ball, never tested the half ball in the cocked position, and never attempted to ascertain what effect a cocked half ball would have on the pump stroke that would result in the deceleration felt by the plaintiff, but, more importantly, on the long history of start problems experienced by the engine.

82. In short, the litigation support people who were running AlliedSignal/Honeywell's investigation with the NTSB deliberately misled the NTSB's investigator.

83. On July 29, 1997, defendant AlliedSignal/Honeywell, in response to questions from the NTSB again deliberately misled the NTSB with false information when John Loring stated, "Amplifier is not functional during start operations. Fuel control is in emergency mode during start operation to readily fill and purge air from system to the engine fuel nozzles. The two missing tangs from the castelated nut surrounding the half

ball seat had no effect in the deceleration direction -- away from valve seat." (Exhibit "27").

84. Each of these statements was false, knowing false, and intended to deflect the NTSB's investigation into the fuel control as it related to the symptoms experienced by the plaintiff. In truth and in fact, the amplifier controls the pump stroke. The engine cannot accelerate beyond 13-15% of RPM without the fuel pumps continuing to accelerate the engine to near 30% of RPM. The cocking of the half ball results in a loss of fuel pump pressure, which prevents the engine from accelerating in start, all of which was known or had to be known to AlliedSignal/Honeywell, but who deliberately misled the NTSB for purposes of its litigation strategy (litigation which was never intended, nor was a claim ever submitted by the plaintiff).

85. Following the transfer of the investigation from the original investigator to NTSB Headquarters, the NTSB further inquired of AlliedSignal/Honeywell because it was concerned that the tests performed by AlliedSignal/Honeywell on the fuel control were flawed, as

some of the test parameters resulted in results outside the specifications for the fuel control.

86. Having been caught by the NTSB in its deceit, AlliedSignal/Honeywell continued the charade with its letter of July 27, 1998 from David W. Dodson, litigation support personnel, "However,. differences from standard or allowances made to account for the test conditions are not believed by AlliedSignal to indicate any degradation in the performance of the engine or its components at the time of the accident." (Exhibit "28").

87. This statement was false, knowingly false, as the tests that were concocted by AlliedSignal/Honeywell never were intended to replicate the condition of the fuel control or the engine at the time of the accident. Such a distinction was not made, however, to the prior NTSB investigator.

88. The NTSB asked, "At what pressures do the pressure switches normally open and close?" Defendant AlliedSignal/Honeywell replied, "The Grumman Hydrol pressure switches were not manufactured by AlliedSignal. AlliedSignal does not know the trip pressure. The two (2)

switches were checked upon NTSB request. Switch S/N 2612L at 485 psu had an open circuit and at 435 psu had a closed circuit. Switch S/L 2302L remained open at all pressure levels from 0 to 900 psu, and was presumed to be non-functional." Yet knowing that this would affect engine operation, AlliedSignal/Honeywell did not disclose to the NTSB the effects of such switch malfunction on the fuel control and the engine operation, all for purposes of preventing the NTSB from focusing on the fuel control as the cause of the accident.

89. The NTSB engine investigator asked AlliedSignal the following, "In exhibits AR82-F28, the nozzle flows for some the test points (5, 6, 7) are outside the limits. Could you explain why that is acceptable or why this doesn't adversely affect engine performance?"

90. For the first time, AlliedSignal/Honeywell said, **"The purpose of this test was not to verify that the Fuel Control ran to Test Specifications.** It was to determine if the Fuel Control responded to throttle input, i.e. advance/decrease in Throttle position has a corresponding

fuel flow change. Fuel Control was changed in the correct direction and also responded to quick/rapid Throttle inputs."

91. This statement, made July 27, 1998, was for the first time an indication that the fuel control was neither tested to specification nor did it "perform to specification" as stated falsely by David W. Dodson in the letter to the Board of January 10, 1997.

92. Defendant AlliedSignal/Honeywell was also requested by the NTSB to examine the fuel utilized by the plaintiff in the aircraft.

93. The NTSB investigator had erroneously concluded that the fuel being used by 80% Avgas and 20% Jet A.

94. In fact, the fuel mixture used was 25% Avgas and 75% Jet A, but the investigator had not obtained the last fuel slip, contrary to the NTSB's investigation procedures and training.

95. Moreover, defendant AlliedSignal/Honeywell, in its zeal to try to protect itself from litigation, engaged in a series of putative scientific analytical fuel examinations for purposes of establishing that the fuel that was claimed by the

pilot to have been put in the aircraft was, in fact, not the fuel in the aircraft at the time of the accident. (Exhibit "29").

96. The putative scientific examinations and tests were false, designed to be false, were never designed to determine the actual fuel put in the aircraft, but were for the sole purpose of hindering, obscuring and preventing the determination of the accident cause, which was the malfunction of the fuel control manufactured by the predecessor to AlliedSignal/Honeywell, Bendix.

The Rand Report

97. During the period of time that the NTSB was publishing and republishing its false narrative in an effort to harm the plaintiff, it had commissioned a study of the party system by the Rand Corporation.

98. The Rand Report concluded:

> The party process, the central organizational mechanism of air crash investigation, should continue to exist as an important source of vital information for the safety board. When the economic stakes are unusually high, however, the risks increase that the process could falter. When a

> modern airliner crashes, implicating design factors with fleetwide effects portending serious economic loss, it is only prudent that the NTSB be prepared to augment the party process through other avenues of securing technical expertise.

99. The NTSB knew, as a result of preliminary drafts of the Rand study, that it would be severely critical of the integrity of the party process; indeed, that the party process was flawed in that parties to NTSB investigations oftentimes have an agenda of litigation suppression, rather than truthful, careful and unbiased inquiry into the facts of an accident, regardless of where the fault may lie.

100. Notwithstanding actual knowledge from experience as confirmed by the independently conducted Rand examination that its party system was flawed, the NTSB chose to incorporate the party system in the investigation of the plaintiff's accident, and then failed and refused, all purposes of reckless, wantonly and negligently harming the plaintiff, to independently verify what it knew, or had reason to know, would be false and misleading

information from, in this instance, the defendant AlliedSignal and Honeywell.

RICO BACKGROUND

The Party System

101. The NTSB has as part of its investigation process a party system which allows the NTSB to rely upon information supplied to it by manufacturers of components of aircraft that have been involved in an accident.

102. As a condition of becoming a party to such an investigation, a party must sign a commitment with the NTSB that no information obtained as a result of the party investigation shall be used for purposes of assisting insurers or their lawyers in litigation, a copy of which exemplar statement and the NTSB Regulations is attached and marked (Exhibit "30").

103. The Product Integrity Department of AlliedSignal/Honeywell is nothing more than a litigation support department for the sole purpose of providing

AlliedSignal's lawyers and insurers with up-front invaluable information for purposes of concocting a defense shall a product liability claim arise out of an accident in which AlliedSignal was a party.

104. The sole purpose of AlliedSignal's/Honeywell's false, misleading and deliberately deceptive statements was for purposes of violating the very written terms of the party agreement and the regulations imposed by the NTSB on parties to the investigation.

105. Thus, the intention all along by AlliedSignal/Honeywell was to assemble information to misdirect the NTSB, to supply such information to its lawyers for defense of a potential products liability claim, and to otherwise harm the plaintiff in the process.

106. This conduct on the part of the AlliedSignal/Honeywell was not confined to the plaintiff's accident, but has been a course of continuous and systematic deception in violation of its written commitment to the NTSB Regulations in accident investigations involving its products

and, in this instance, in conspiracy with investigators of the NTSB and the NTSB itself for purposes of harming the plaintiff, who has long been an outspoken critic of and litigation adversary to defendant AlliedSignal/Honeywell.

The Certification Process

107. The function of the Federal Aviation Administration ("FAA") under the Federal Aviation Act, 49 U.S.C.A. § 44701, *et seq.*, is to promote aviation to ensure the safety of flight.

108. The FAA has interpreted the promotion of aviation as a license to abdicate its responsibilities with respect to policing designers and manufacturers of aircraft components and deferring to the manufacturers' superior knowledge of the designs, systems, and operation of such components to perform those functions in an honest, honorable, and safe manner.

109. The FAA has repeatedly been forewarned that the adoption of such a hands-off policy would result in a

breakdown of the honor system, the development of a non-responsive and irresponsible attitude on the part of manufacturers, and a risk to the public that critical reliability in aircraft engines as well as timely identification, modification, and repair of such systems would not result, given the lack of any credible threat of the FAA's oversight or enforcement.

110. Through a system of deception, defendants AlliedSignal and Honeywell, as agents for the others, were openly solicitous of the FAA and its officials so as to make them part of the deception and the breach of the public trust by inveigling them into the process of willful failure to provide engine reliability and by befriending them, and thus persuading them to avoid critical oversight responsibilities.

111. While the airworthiness certificate for aircraft engines is issued by the Federal Aviation Administration, in actual practice certification of aircraft engines is conducted essentially by the manufacturer, in this case AlliedSignal/Honeywell.

112. Employees of AlliedSignal/Honeywell, known as designated engineering representatives and others, receive their paychecks from the manufacturer, but purportedly act in behalf of the FAA for certification purposes.

113. The certification of the engines was therefore conducted essentially by employees of AlliedSignal/Honeywell or those acting in their behalf, and not employees of the FAA.

114. Historically, AlliedSignal/Honeywell knowing or having reason to know that its engines or engine components were unreliable in tests, certification, and service, it has willfully, wantonly, and recklessly, with the intent to deceive the FAA and the NTSB, certified engines, their modifications and components, when in fact the reliability analysis was false and misleading, and recklessly so.

115. Defendants AlliedSignal and Honeywell have conspired with the following unnamed defendants in this case, historically for the sole purpose of enhancing its corporate coffer at the expense of lives of patrons of aircraft in which their components are installed. Defendant AlliedSignal has conspired with Textron for purposes of deliberately deceiving the FAA, the NTSB, corporate operators, helicopter owners and their manufacturers about the unreliability of the LT-101 Series powerplant and in particular, as in the past and continued to deceive the United States Coast Guard, corporate operators of helicopters equipped with LT-101 engines about the reliability, and better said the unreliability, of the powerplant in service.

116. Indeed, defendant AlliedSignal, after purchasing the product line from Textron, conspired with Textron and others to hide the continuing unreliability of the powerplants, as well as the modifications sold to operators purportedly to make them more reliable, which turned out to be even less reliable than the components that they replaced.

117. Defendant AlliedSignal conspired with unnamed defendants, Piper Aircraft Corporation and New

Piper Aircraft Corporation, in connection with the production of autopilots for aircraft, in particular the Piper Malibu and Malibu Mirage, which autopilots were completely unsuited for use in high altitude flight operations, especially in aircraft that were structurally unable to sustain high speeds at light weights. The AlliedSignal/Honeywell defendants, in conspiracy with Piper, all for purposes of increasing the coffers of AlliedSignal/Honeywell, deliberately hid from the NTSB and the FAA flaws in the autopilot controls, the unreliability of the autopilot systems, failures in the trim system and cable tension so as to deceive these agencies of government from determining that the autopilot's flaws were a major factor in multiple in-flight breakups of these aircraft, resulting in dozens of fatalities.

118. This conduct on the part of AlliedSignal/Honeywell has continued for years unabated and continues to this day in an unbroken series of false and misleading information to aircraft owners, aircraft manufacturers, public authorities such as the NTSB and FAA, which has resulted in an unbroken string of in-flight

breakups of aircraft in which the auto-pilots have been installed.

119. AlliedSignal purchased the product line of jet engines from Textron, and subsequently misrepresented to the aviation industry for purposes of hiding and deceitfully so just how unreliable, unsuitable and unairworthy the engines were in service by:

a. Preventing the disclosure to the public-at-large of documents that revealed how unreliable the engines were;

b. Preventing the disclosure to the public-at-large how unreliable Product Improvement Programs were;

c. Preventing the disclosure to the public-at-large how enormous the profits were on modifications necessary to make the engines more reliable;

d. Requiring litigation settlements and documents produced in litigation to remain confidential so

that the public-at-large would not know how unreliable the engines were;

e. Conspiring with Textron for purposes of hiding documents and information from litigants, as well as from the FAA so as to prevent full disclosure on the serious and defective nature of the powerplants;

f. Misleading the FAA and the NTSB in its investigation of the cause of Piper Malibu in-flight breakups as they related to autopilot malfunctions;

g. Hiding documents in litigation concerning the return of autopilot components for repairs and modifications;

h. Denying the FAA and the NTSB information concerning its actual knowledge of the cause of autopilot induced in-flight breakups in Piper Malibu aircraft.

The National Transportation Safety Board

120. All fatal aviation accidents within the United States are investigated by the National Transportation Safety Board.

121. The NTSB is supposed to investigate such accidents and determine the probable cause for them.

122. The NTSB has traditionally been a repository of either political appointees who have little or no experience in aviation, little or no experience in aircraft accident investigation, and little or no interest in embarrassing the builders of aircraft in the United States.

123. The NTSB, as a matter of its practice, invites as parties to the investigation those persons whose legal liability is at risk from a probable cause determination that would reveal a defect in the aircraft or helicopter that crashed.

124. The NTSB has invited to participate as parties to the investigation of various helicopter and aircraft accidents of those powered by defective engines and whose in-flight breakups were undoubtedly caused by autopilot malfunctions, including defendant AlliedSignal.

125. As a consequence of the involvement with the investigations of the NTSB, the investigations into the causes of accidents have been sidetracked, misdirected and obfuscated to the extent that AlliedSignal/Honeywell has failed to provide the NTSB with the full scope of the risks associated with the operation of the engines it manufactures in aircraft and helicopters, as well as autopilots as they may relate to loss of aircraft control and in-flight breakups.

126. The NTSB, as part of its corrupt conspiracy with industry, including this defendant, has conspired with manufacturers of aircraft, such as Boeing, McDonnell Douglas, Piper, Cessna, Textron, AlliedSignal, Teledyne and others, to corrupt the investigatory process in an effort to assist these major companies to avoid legal liability for accidents.

127. For example, in the Boeing 737 instance, in particular, in 1991 a Boeing 737 (United Flight 585) crashed in Colorado Springs, Colorado.

128. The NTSB engaged as parties to that investigation The Boeing Company (manufacturer of the aircraft) and other manufacturers of powerplants, as well as

various interests in the outcome of the investigation, and the very airline that operated the aircraft.

129. Not surprisingly, the NTSB was baffled in its investigatory efforts because of the misdirection of the very parties of the investigation it had selected for the corrupt purposes previously stated.

130. As a consequence of the misdirection of the NTSB, willingly participated in by that agency, another planeload of Boeing 737 passengers were killed, COPA Flight 201, which crashed in Panama.

131. While the NTSB courted the manufacturer of that aircraft, it invited defendant Honeywell to participate in that investigation, who further misled the investigators, who were clueless as to the effects of the defective rudder actuator, and its impact on controllability accidents and incidents involving the Boeing 737.

132. Repeatedly, the plaintiff warned the NTSB that the cause of the crashes of United 585 and COPA 201 was the rudder. Plaintiff had ascertained the cause of rudder failures, and even the reasons for same, but the NTSB was not interested and, instead, continued to rely on misdirection

and misinformation given to it by The Boeing Company and others in the investigation.

133. Notwithstanding plaintiff's warning, given both publicly and privately to the NTSB, the NTSB did nothing, as a result of which another 132 people were killed in the crash of USAir Flight 427 in Pittsburgh, Pennsylvania in September of 1994.

134. As a result of the NTSB's willful, deliberate, corrupt conspiracy, Boeing, United Airlines and Parker Hannifin, all designed to adversely affect the finances of those companies, the NTSB sacrificed the lives of hundreds of passengers of Boeing 737 aircraft, all for the purpose of avoiding embarrassment and costs to the industry it serves.

135. The corruption of the NTSB *inter alia* consists of:

a. Allowing itself to be misled, to be knowingly misled, in an effort to avoid learning the truth about accidents, which would result in liability to the very entities it is supposed to investigate;

b. Deliberately, willfully and recklessly failing to train its personnel so they would have sufficient

knowledge to be able to intelligently contradict the misinformation supplied by the product integrity driven investigators supplied by industry in the party system;

c. Corruptly, carelessly, recklessly and wantonly ignoring information supplied by informed investigators when it contradicts information that would exonerate innocent crew members of aircraft;

d. Inexcusably failing to educate itself, its members, and its employees in the intricacies of aircraft systems they are supposed to investigate so they will have independent knowledge sufficient to independently come to the correct conclusion as to the cause of aircraft accidents;

e. Corruptly, deceitfully failing to keep the family members of airline accidents informed of the details of its investigation, in violation of the Family Assistance Act, 49 U.S.C. § 1136.

f. Corruptly, unlawfully, recklessly conspiring with Egyptian officials for purposes of avoiding embarrassment to the Egyptian Government by holding the public hearing on the causes of the crash of Egyptair Flight 990, and then failing to publicize a probable cause

determination of the cause of Egyptair 990, acceding to pressure from the Egyptair Government, all in violation of its Congressional mandate.

136. The NTSB also corruptly and unlawfully, and in conspiracy with Boeing, Alaska Airlines, McDonnell Douglas and others to deprive litigants in Article I II courts from obtaining information relating to the crash of Alaska Airlines 261, as well as USAir Flight 427, issued letters to counsel for Boeing, Alaska Airlines and USAir, at their request, directing that they should not supply in litigation brought under Article III of the United States Constitution information that had been supplied to the NTSB wholly irrespective of whether such information had been obtained, gathered in the ordinary course of business prior to the accident which caused the NTSB to investigate in the first instance.

137. Such conduct by the NTSB is a deliberate attempt to obstruct justice, to obstruct the investigation of aircraft accidents by those more qualified and able to investigate, to impair the ability of litigants to achieve their Constitutionally guaranteed rights to trial by jury and

appearance in court to enforce their rights, and to otherwise assist in the illegal enterprise of preserving the financial resources of the manufacturer of aircraft and airlines who operate them to the detriment of the plaintiff and his clients.

The Damages Claimed

138. The plaintiff is an aviation lawyer. His entire career has been based on his unquestioned zeal and honesty. His reputation as a lawyer and pilot are beyond reproach. Referral sources, like pilots, other lawyers, and the public at large will read and have read this false narrative. Many read the earlier false narrative.

139. Given that the new narrative, which repeats in substance the first and is equally false, those who read it will and did believe the plaintiff did not properly obtain his LOA (which he did), flew without a license (which he did not), failed to do a proper preflight (which is false), failed to maintain his airplane and its logs (which is false), and all the

other litany of things which are false and negligent about the second narrative.

140. Moreover claimant is an acknowledged expert in the field of aviation safety, a credential earned over thirty years of picking up after the NTSB cursorily investigates and says pilot error. The NTSB would still be confused about what caused both the UAL 585 and USAir's 427 accidents if it were not for the work of the plaintiff and his metallurgical scientists who discovered why the servo valve fails in the Boeing 737.

141. To harm the plaintiff in such a careless and reckless manner, in complete disregard for the truth as determined by the NTSB's own investigators, has and will destroy him both professionally, personally and emotionally. Plaintiff is at the height of his career. Undoubtedly, this false and negligently prepared and distributed document will affect not only his desirability as a lawyer, but also his employability as such.

142. Plaintiff would expect and has experienced prospective clients not to call, referrals not to come, media not to call, media to inquire about the truth of the narrative and pilots to look upon him with unearned disdain.

143. On a more important side to plaintiff is the injustice of the NTSB's carelessness and recklessness in already knowing that the information in the narrative is false and not agreed to by its own investigators, yet publishing it once again which has caused the plaintiff emotional harm, embarrassment, has inflicted pain aggravated plaintiff's crash related injuries and has caused economic injury in plaintiff's profession and business.

144. In short the NTSB has negligently, carelessly and recklessly harmed the plaintiff's life at a time when he should be enjoying the full measure of credit for working a lifetime to improve aviation safety.

145. At the time the NTSB published its second false narrative, and while the Fox lawsuit was pending by the plaintiff and Fox against the NTSB under FOIA, the NTSB

continued to threaten the plaintiff that it was going to disclose documents that had been provided in confidence during the investigation, and in addition disclose the false narrative that had originally been published.

146. The Fox libel lawsuit was coming to trial in Philadelphia, Pennsylvania, and the demand for settlement of that lawsuit was $5,000,000.

147. Solely as a consequence of the NTSB's threatened disclosure, in violation of its own Rules and its assurances to the plaintiff, the plaintiff was required to settle that lawsuit for a fraction of that amount.

148. As a further result of the conduct of the NTSB in falsely publishing parts of its investigation that it never discloses and the results of defendant AlliedSignal's deliberately false, misleading and litigation oriented report, which were published, other publications have unjustly and unfairly criticized the plaintiff, including the respected publication Aviation Safety, a copy of which article from the August 2000 issue is attached and marked (Exhibit "31").

149. As a result of the deliberate, unlawful, misleading, false and deceitful acts of the NTSB in concert with defendants AlliedSignal and Honeywell, as well as its carelessness and recklessness, knowing that its reports, letters and narratives were false and contradicted by its own investigators, the plaintiff has been damaged in his business and profession, is constantly defending himself from the falsely published information, suffered physically and mentally, has been unable from time to time to engage in his profession, and has incurred bills and expenses for his medical care and treatment, has seen physicians for the physical and psychological impact from the injustice imposed upon him which have aggravated the injuries suffered in the accident and has been deprived of the enjoyment of a full measure of credit for working a lifetime to improve aviation safety.

Theories of Liability

COUNT I

WILLFUL, WANTON, RECKLESS AND NEGLIGENT INTERFERENCE WITH BUSINESS, PROFESSION AND PROPERTY RIGHTS

Plaintiff v. NTSB and Ten Unknown NTSB Employees

150. Plaintiff incorporates by reference paragraphs 1 through 149 as set forth at length herein

151. This claim is not based on a dispute with the NTSB's ability to determine probable cause of accidents, or even its right to conduct investigations of accidents. Rather, it is based on the NTSB's ten unknown employees careless, negligent and/or deliberate attempt to harm the plaintiff in his profession by ignoring its own investigators' findings, ignoring documentary evidence that was not in dispute, unconstitutionally applying its procedures protecting aircraft manufacturers, and to negligently harm the plaintiff.

152. While knowing that it is bound by FAA's own interpretation of its regulations, Garvey v. NTSB, supra., the

NTSB and its ten unknown employees deliberately or negligently misinterpreted those regulations, and the law by which the NTSB is bound, by people who have never applied for, obtained or know anything about Letters of Authorization to fly surplus military jet aircraft.

153. The NTSB and its ten unknown employees were previously warned that such careless, reckless and intentional negligent or intentional conduct would not be tolerated and would harm the plaintiff.

154. In the face of that explicit warning, and the findings of the three new investigators that the old narrative was wrong and plaintiff was right, resulting in a new narrative, the NTSB nonetheless carelessly, negligently and deliberately without regard for the outcome or damage to the plaintiff made the same mistakes again, published them on the Internet, and distributed reports to requestors. (Exhibit "18")

155. In spite of the NTSB's counsel being forewarned that the violation of its regulations and

procedures would interfere with the Fox lawsuit, a valuable property right of the plaintiff, he and the NTSB did carelessly, recklessly and deliberately thereafter threatened to give to Fox all of the NTSB file including that which it had already determined was false for the purpose of harming the plaintiff in his profession and interfering with his property rights against Fox.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT II

RICO

Plaintiff v. AlliedSignal, Honeywell and TenUnknown NTSB Employees

156. Plaintiff incorporates by reference paragraphs 1 through 155 as though set forth at length herein.

157. At all times material hereto, these defendants comprised and conducted an enterprise, together with those other unknown defendants but named entities, affecting

interstate commerce as defined by 18 U.S.C. § 1961(4), an ongoing organization with an operational or decisional framework whose members function as a unit to perform certain duties to benefit the enterprise and which existed separate and apart from the pattern of racketeering activity in which it was engaged, all in violation of 18 U.S.C. § 1962. The ongoing organization was the defendants, as well as the conspirators mentioned, functioning as a unit for purposes of obstructing justice, interfering with the investigation of an agency of government, assisting manufacturers in litigation defense in violation of the Congressional mandate, hiding information from the public relating to safety issues concerning aircraft equipment, preventing the FAA, pilots, aircraft owners and the public-at-large from knowing the risks associated with the operation of equipment manufactured by the defendants, and deceiving and depriving the public into thinking that the NTSB was functioning as Congressionally mandated when, in fact, it was merely an investigation arm of the corporate defendants and those mentioned, but not sued, who they conspired with to prevent losses in litigation.

158. The racketeering activity consists of multiple uses of the U.S. mails and interstate wire transactions including facsimiles and e-mail, all in violation of 18 U.S.C. §§ 1341 and 1343, including the use of interstate wires, mail by and between all defendants and among them, and all those not sued but who are mentioned, all of which have taken place within the last four years and before and continued to this today, including communications by and among counsel, all of which were and are related to the enterprise's purpose, and which impose a threat of continued criminal activity. Moreover, the defendants, through their misconduct with the FAA and NTSB employees, corrupted public officials who were willingly corrupted for purposes of avoiding grounding all aircraft and helicopters powered by the engines manufactured by these defendants, withdrawing the Supplemental Type Certificates for auto-pilots manufactured by these defendants, and preventing the investigation by criminal authorities of the conduct of certain NTSB employees.

159. The mail and wire fraud of these defendants consisted of defendants' use of the United States mails and other electronic media for the following:

a. Transmitting between all defendants or some of them, and those mentioned who are not sued, correspondence, requests for proposals, design drawings, responsive drawings, and other communications, together with similar communications to the FAA and to the NTSB, all with the intent to conspire, concoct, and defraud the administrative process by preventing the FAA and the NTSB from knowing just how seriously flawed the products manufactured by this defendant were or determining the causes of aircraft accidents, including the one which injured the plaintiff;

b. Transmitting through the United States mails and other electronic media documents, including submissions, analyses, calculations, tests and other documents designed to mislead and deny certifying and investigating authorities adequate information upon which they could determine the cause of the plaintiff's accident;

c. Deliberately deceiving public authorities as to the actual failure of the fuel control, the engines in other instances, and autopilot components in other instances;

d. Deliberately deceiving public authorities as to the failure modes as they may have related to this accident, as well as accidents and incidents involving aircraft;

e. Deliberately delaying, obfuscating, and confusing public authorities as to the seriousness of the flaws in components manufactured or supported by these defendants;

f. Deliberately and deceptively hiding failure modes, actual examples of failures, and information as to the actual functioning methodology of components for which they have manufacturing or support responsibility;

g. Deliberately hiding, secreting and preventing public disclosure of critical documents, both within and without litigation and between themselves and others, which would have alerted persons how unreliable and dangerous components manufactured by these defendants are

and, more importantly, would embarrass the NTSB into stumbling over the correct reasons for accidents that have taken countless lives.

160. As a consequence of the continued violations of 18 U.S.C. § 1962, these defendants, some of them, all of them, those sued here and not, received money derived from the pattern of racketeering activity, which has been invested in the enterprise which affected interstate commerce, to wit, they have sold components, replacement components, product improvement packages, services to repair the power-plants, auto-pilots and other avionics systems, they have continued to build aircraft with defective rudders, they have continued to operate aircraft with defective rudders, they have continued to operate as airlines, all while imposing an unreasonable risk of harm on their passengers, all which money was used to further the illegal activities, such as the making of campaign contributions, lobbying of legislators, providing "investigators" to the NTSB who were nothing than euphemisms for litigation support personnel, all in violation of 18 U.S.C. § 1962(a), and plaintiff suffered injury

as a result of the investment of racketeering income distinct from the injury caused by the predicate acts.

161. These defendants, some or all of them, those sued here and those not, through the pattern of racketeering activity described herein, acquired and maintained an interest in and/or control of the enterprise, specifically, there was a nexus between the control of the enterprise and the racketeering activity, all in violation of 18 U.S.C. § 1962(b).

162. The ten unknown NTSB employees, acting beyond the scope of their Congressional mandate was, in fact, for purposes of this RICO action acting as an agent, servant, workman and/or employee of the named defendants and those not named but mentioned, acting not in their governmental capacity, but rather in a private capacity, as such conduct was neither authorized nor countenanced by the statute which created the Independent Safety Board, and thus the NTSB as an entity acting privately and not as a governmental entity is as liable as the other defendants under 18 U.S.C. § 1962(c), as all of the defendants sued directly or mentioned indirectly participated either directly or indirectly in the conduct of the affairs of the enterprise, and participated

through a pattern of racketeering activity prohibited by 18 U.S.C. § 1962(c), and as to the defendants AlliedSignal and Honeywell, the plaintiff incorporates by reference the specific mail fraud and false and misleading statements made to the NTSB in their correspondence of November 20, 1996, December 2, 1996, January 10, 1997, July 29, 1997, July 27, 1998, and October 16, 1998.

163. Moreover, the conduct of defendants AlliedSignal and Honeywell, as well as the other unknown defendants, included:

a. The aiding and abetting of other unnamed defendants to mislead the FAA as to the reliability or unreliability of engines and auto-pilots; and

b. Hiding, secreting, transferring critical documents which would disclose the unreliability of the power-plant;

164. Defendants AlliedSignal and Honeywell have also not been honest in disclosing to the aviation industry the unreliability of the power-plants, its auto-pilot and in particular the fuel control in the plaintiff's airplane.

165. As a further consequence of the continued violations of 18 U.S.C. § 1962 by the defendants, the plaintiff has suffered injury to his business and his property, to wit, he has lost large sums of income as previously set forth, has been caused to incur huge expenses to maintain his law practice to overcome the adverse publicity generated by the deliberate misleading of the NTSB, has suffered substantially increased costs of operation, has been compelled to settle his claim against Fox news for a fraction of what it is worth, all as a result of the commission of some or all of the predicate acts, and therefore has standing to prosecute this claim under 18 U.S.C. § 1964(c).

166. Defendants further conspired with themselves and with others, and agreed to violate the provisions of subsections (a), (b) and (c) of 18 U.S.C. § 1962 as previously described, in violation of 18 U.S.C. § 1962(d). The conduct of the defendants was an accommodation, conspiracy and/or criminal enterprise for purposes of conducting an illegal activity, the commission of fraud, the compromise of public officials, the procurement of malfeasance and misfeasance in office of public officials, including those of the FAA and the

NTSB, and was never designed to further the purposes which were represented, and that is the certification of aircraft components and the assistance as a party to accident investigation.

167. The defendants' conduct was in fact a criminal enterprise designed, conceived, and perpetrated for purposes of avoiding the literal requirements of the Federal Aviation Regulations and obligations of the law to build aircraft components that were not unreasonably dangerous, defective or ran an unreasonable risk of serious personal injury or death to the occupants of aircraft or helicopters to which they were attached, and after notice and actual knowledge of incidents and/or accidents, failing to modify the same, all of which resulted in the windfall of profits to the defendants by the money saved in failing to modify these components.

168. The defendants were also engaged in the criminal enterprise for purposes of avoiding the literal requirements of the National Transportation Safety Board Regulations as they apply to parties, from which deceptions the defendants avoided litigation for a defective and

dangerous power-plant component, *i.e.* the fuel control, which resulted in the crash of the plaintiff's aircraft.

169. The defendants, all in conspiracy with each other and those not sued but mentioned, deliberately aided and abetted these other parties not sued by falsely and deceptively giving public officials and accident investigators information that was incorrect, known to be incorrect, and all for purposes of avoiding public disclosure of the seriousness of the flaws in their products.

170. Textron, AlliedSignal, and others in concerted action for purposes of effecting an unlawful conspiracy:

a. Deliberately failed to warn the FAA and the NTSB of flaws in the aircraft components;

b. Deliberately, wantonly, and falsely worked the FAA and the NTSB by misleading them into a lack of understanding as to how flawed the fuel control in the plaintiff's power-plant was, as well as its unreliability as a result of the missing amplifier tangs, and then misled the NTSB into not understanding how the fuel control and its amplifier worked, all for purposes of directing the NTSB's focus on the plaintiff, rather than the components of the

aircraft as the cause of the accident, while knowing that the plaintiff was blameless;

c. Deliberately, willfully, and wantonly, in writing and otherwise, attempting to misdirect investigation efforts of the FAA and the NTSB, such as they were, in order to avoid responsibility for the crashes of various aircraft and helicopters, including the plaintiff's aircraft.

171. Since the certification process of the various components manufactured by these defendants, and others with whom they conspired, they have prevented the plaintiff, the public at large, the plaintiff's clients, and the FAA from knowing and understanding the true causes of accidents by misleading those who would willing be misled, by deceiving those who would willingly be deceived, by corrupting those who would willing be corrupted, so as to prevent the Congressional mandate being realized by the NTSB.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT III

DEFAMATION AND TRADE LIBEL

Plaintiff v. Defendants Allied Signal, Honeywell and Ten Unknown NTSB Employees

172. Plaintiff incorporates by reference paragraphs 1 through 171 as though set forth at length herein.

173. These defendants are liable to the plaintiff on the theory of negligent and/or intentional defamation.

174. At all times material hereto, these defendants knew that information that was false, deceptive, corrupt, and inaccurate would be harmful to the plaintiff, in that it would paint the plaintiff as a careless and negligent pilot, when his experience and demonstrated ability was directly to the contrary.

175. These defendants knew that the disclosure of such information to the public would impair the reputation of the plaintiff in the public's eyes, and would diminish the plaintiff's desirability, both as a lawyer and as a consultant.

176. These defendants knew that the plaintiff was embarrassingly accurate with respect to his assessment of the

causes of aircraft accident, often at odds with the NTSB and with the defendants, but nonetheless accurate in his assessment.

177. These defendants were aware of the plaintiff's reputation for dogged determination in litigation to uncover the truth and the facts surrounding the causes of accidents, even while the NTSB was paralyzed in its investigation process by ineptitude, lack of training, willingness to be misled, and corruption.

178. These defendants knew that by deliberately, willfully, negligently, carelessly and recklessly deceiving each other that the plaintiff's reputation would be damaged irreparably, and he would suffer harm, which was the intent or as a result of reckless disregard.

179. Notwithstanding these defendants' actual knowledge and/or the reason to have knowledge that the plaintiff would be damaged, these defendants nonetheless continued their conspiracy to defame the plaintiff and to falsify reports, tests and documents for purposes of their later disclosure, which would embarrass, humiliate and damage the plaintiff in his business, profession and reputation.

180. All of these defendants' conduct was unjustified, willful, deliberate, fraudulent, misleading, inaccurate and heinous, but it was also careless, reckless, negligent and did harm the plaintiff in his business and profession.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT IV

DENIAL OF EQUAL PROTECTION UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUION

Plaintiff v. Defendants Allied Signal, Honeywell and Ten Unknown NTSB Employees

181. Plaintiff incorporates by reference paragraphs 1 through 180 as though set forth at length herein.

182. The NTSB had as a policy the non-disclosure to litigants of all documents that had been obtained by

investigators during the course of an investigation, which would not be part of the final report of the investigator.

183. The NTSB had long established a procedure such that disclosures of participants in the investigation would not be disclosed to others as it was presumed to be provided in confidence and as part of the investigatory process.

184. The NTSB had a policy that would prevent participants in an investigation from disclosing to anyone the documents, tests, procedures and information supplied during the investigatory process.

185. The NTSB long had a policy and procedure that in order to encourage the full, fair and complete disclosure by participants in an accident investigation that the information provided would be kept confidential, and would not be disclosed under the Freedom of Information Act or any litigation brought under that Act.

186. The NTSB long had a policy that even in litigation, participants in an accident investigation were not permitted to disclose information that was supplied to the

NTSB or obtained as a consequence of the participation in the accident investigation.

187. The plaintiff relied upon the fair, impartial and equal protection provided by the NTSB policy and regulations, the implementation of the same, and the protections afforded to the same under the Fifth Amendment to the United States Constitution that he would be provided equal protection in the administration of those regulations.

188. During the course of the investigation, it became apparent to the NTSB and the ten unknown NTSB employees that the Chicago office of the NTSB had violated the Board's procedures, and even its own internal procedures with respect to the investigation of the plaintiff's accident.

189. In particular, it became apparent to the NTSB that the investigator assigned and his superiors had failed to follow the very most fundamental policies in the training manuals used for the training of investigators of aircraft accidents.

190. The details of that investigator's failure have been outlined previously, however, they include the failure to obtain the fuel slip, the failure to examine the fuel control

internally, the failure to know and understand how the fuel control worked before relying upon the defendants Allied Signal and Honeywell, the failure to investigate the plaintiff's allegations of previous failures and of existing failure, the failure of the investigator to accurately determine the plaintiff's qualifications, the failure of the investigator to contact the FAA to determine the status of the plaintiff's pilot qualifications, the failure of the investigator to obtain a copy of the flight manual, maintenance manuals and overhaul manuals in an effort to understand the operation of the aircraft and the reasons for its failure, just to name a few.

191. Once the NTSB had determined that its regional office employees had violated the NTSB's own regulations, it removed the erroneous narrative placed on the Internet and supplied to certain requesters, and assigned other investigators.

192. One of those investigators, disregarded information that had been erroneously provided by one of the ten unknown NTSB employees and renewed the investigation in an effort to understand how the plaintiff's aircraft crashed. Under the procedures established by the

NTSB long ago, the information discarded by the second investigator, indeed, that information discarded by the first investigator is unavailable to the public under any circumstances.

193. It was the job of the second team of investigators to write a probable cause report of the plaintiff's accident, and such probable cause report was written.

194. It is the process and procedure of the NTSB, given that it consists primarily of political appointees, most of whom have no accident investigation experience whatsoever, to accept the recommendation of experienced accident investigators.

195. In violation of the Fifth Amendment to the United States Constitution, and for the reasons previously set forth to conduct an illegal, corrupt, humiliating, intentionally defamatory conduct by the ten unknown NTSB employees did totally disregard both its regulations and policy with respect to the non-disclosure of discarded and disregarded investigatory documentation.

196. The ten unknown NTSB employees, in concert with the Justice Department, did intend to disclose to Fox News all of the information that had been assembled, much of which had been discarded and disregarded by the second investigatory team as untruthful, wrong and unsuitable for an investigation into the conduct of the accident.

197. The conduct of the ten unknown NTSB employees required the plaintiff to file a reverse FOIA lawsuit in an effort to prevent the disclosure of the privileged and non-disclosable documents and require the plaintiff to precipitously settle his lawsuit with Fox News for a fraction of its value, all before they disclosed the documents to Fox.

198. Even though the NTSB conceded that the documents were false, that the narrative was false, that the investigation was flawed, that the conclusions were flawed, that the investigation was improper and violated NTSB procedures and plaintiff's Constitutional rights, the NTSB's ten unknown employees nonetheless chose to litigate against the plaintiff to violate his constitutional rights for purposes of precipitously disclosing what had, by policy, been non-

discoverable, all to the plaintiff's detriment in his business and profession.

199. Moreover, the probable cause determination as written by the second investigator, which took cognizance of the deliberate misstatements of defendant AlliedSignal/Honeywell, the falsity and nonsensical conclusion of AlliedSignal/Honeywell in connection with its participation as a party, was entirely disregarded by the ten unknown NTSB employees in violation of the plaintiff's Fifth Amendment to the United States Constitution.

200. In short, the ten unknown NTSB employees conspired with Allied Signal and Honeywell and totally disregarded a policy applied across the board for the protection of participants in accident investigations and totally disregarded it own determination that the investigation into the plaintiff's accident was flawed for the sole purpose of recklessly, negligently, intentionally and wantonly violating plaintiff's Constitutional Rights, inflicting emotional and economic harm upon his business, profession and person, and holding the plaintiff to a defamatory light for the public at large, all in violation of the protections afforded

to the plaintiff under the United States Constitution, as interpreted by the United States Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT V

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff v. Defendants AlliedSignal, Honeywell, the NTSB and Ten Unknown NTSB Employees

201. Plaintiff incorporates by reference paragraphs 1 through 200 as though set forth at length herein.

202. The conduct of the defendants was designed to break the plaintiff.

203. The conduct of the defendants was designed to so demoralize the plaintiff that he would no longer wish to be the ardent critic of the ineptitude of government agencies,

such as the NTSB, and litigation to vindicate the rights of those who have been killed as a result of the dangerously defective products manufactured by the defendants.

204. The conduct of the defendants was for the sole purpose of preventing the plaintiff from actively pursuing his profession and from harming him economically and emotionally.

205. The defendants' conduct was successful, albeit temporary, by preventing the plaintiff from working, by substantially increasing the cost of the plaintiff operating his business, by diminishing the plaintiff's engagement by victims of aircraft accidents, in particular Alaska Airlines Flight 261 and others, by impairing the plaintiff's credibility with pilots, aircraft owners and the industry as a whole, by holding the plaintiff up to humiliation and criticism that was unjustified, by encouraging others in the field of aviation to write unfair and unjust articles based upon the false, misleading and deliberately damaging publications by the defendants.

206. The conduct of the defendants was without privilege of any kind, was for purposes of corrupting the

process of accident investigation, and was for the purpose of harming the plaintiff for the economic benefit of the defendants Allied Signal and Honeywell as aided by a completely and willing corrupt agency of government, the National Transportation Safety Board.

207. As a consequence of the willful, deliberate, deceitful, intentional and negligent conduct by the defendants, the plaintiff prays for compensatory and punitive damages as permitted by law.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT VI

OBSTRUCTION OF JUSTICE AND LYING TO A FEDERAL AGENCY

Plaintiff v. Defendants AlliedSignal and Honeywell

208. Plaintiff incorporates by reference paragraphs 1 through 207 as though set forth at length herein.

209. The administration of justice in this Country, whether such justice is through an administrative agency, such as the NTSB, or the courts, depends upon the integrity of those who communicate information to it.

210. This ability of government and the courts to function requires truthfulness, accuracy and absence of guile or ulterior motive.

211. It is unlawful to lie to a federal agency, especially when such conduct would obstruct an investigation of an accident or be in furtherance of a criminal enterprise or conduct.

212. The conduct of defendants AlliedSignal and Honeywell was a deliberate interference with the administration of justice by the NTSB, albeit flawed and corrupt, a deliberate obstruction of a federal investigation, and an intentional effort to harm the plaintiff by such obstruction.

213. As a consequence of the wilful, deliberate, unjustified and intentional obstruction of justice and interference with the efforts of a federal agency, the plaintiff

has been damaged as previously set forth, for which the plaintiff demands punitive damages.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT VII

CIVIL CONSPIRACY AND CONCERTED ACTION

Plaintiff v. Defendants AlliedSignal, Honeywell, the NTSB and Ten Unknown NTSB Employees

214. Plaintiff incorporates by reference paragraphs 1 through 213 as though set forth at length herein.

215. Long prior to the plaintiff becoming aware of the defendants' conduct, all conducted in secrecy and without informing the plaintiff that such deceit was ongoing, the defendants knew that the information supplied to the NTSB was false, and that it would be relied upon by the NTSB in its inevitable determination that the power-plant on the plaintiff's aircraft did not malfunction.

216. The defendants knew that by failing to obtain information in connection with the investigation necessary for them to make a determination of the reliability of the plaintiff's powerplant, they would inevitably conclude that the plaintiff's power-plant operated properly.

217. The NTSB relied upon the defendant's utilizing tests, obtaining information from which the Allied Signal and Honeywell defendants could reliably inform the NTSB of the technical conclusions reached by that defendant.

218. Because the NTSB is so bereft of technical knowledge, it relies upon the integrity of persons in the position of the Allied Signal and Honeywell defendants to supply information that will not be false and misleading.

219. Nonetheless, the defendants, in conspiracy with one another, with their insurers, with their lawyers, and with members and the ten unknown NTSB employees, all for purposes of avoiding potential liability for the plaintiff's injuries, deliberately, willfully, in concert and in conspiracy supplied misinformation by failing to test the components of the plaintiff's aircraft in a manner that would reveal the truth

of their malfunction, and then supplied the NTSB with conclusions that the components could function properly when, in fact, the defendants knew or had reason to know that their tests and their examinations were never designed to reveal the malfunctions claimed.

220. The entire purpose of the conspiracy and concerted action was to deprive the plaintiff and the NTSB of the knowledge of the reason for failure so that the plaintiff would be exonerated from responsibility for the accident, and it was for the purpose of humiliating, embarrassing, deprecating, hurting and impairing the plaintiff's ability to function and interfering with plaintiff's property and constitutional rights.

221. As a result of the civil conspiracy and concerted action, designed to keep secret the information necessary for the NTSB to determine the actual cause of the plaintiff's accident, the plaintiff has been damaged, and as a consequence of that willful conduct, the plaintiff prays for punitive damages against the Allied Signal, Honeywell, the ten known NTSB employees and damages against the NTSB.

WHEREFORE, plaintiff demands judgment against the defendants for compensatory and punitive damages, attorney's fees, interest and costs in excess of $100,000.

COUNT VIII

EQUITABLE RELIEF AND INJUNCTION

Plaintiff v. Defendants AlliedSignal, Honeywell, the NTSB and Ten Unknown NTSB Employees

222. Plaintiff incorporates by reference paragraphs 1 through 221 as though set forth at length herein.

223. The plaintiff has been damaged financially, but also has been irreparably damaged and will continue to be irreparably damaged as long as the deceit of the defendants and the product of it is allowed to continue.

224. As a consequence of the deceit of the defendants, and the conduct of the NTSB in publishing the same, in spite of knowledge and information to the contrary, the plaintiff has been criticized publicly in respected aviation publications, including Aviation Safety, and undoubtedly will be the subject of other publications relying on the same misinformation in the future.

225. This will result in repeated damages to the plaintiff, which are not cognizable at law and will result in continuing events of irreparable harm.

226. Plaintiff, therefore, requests this court to order the following equitable relief in addition to the award of money damages as demanded, such equitable relief to include the following:

a. A complete and without reservation apology to the plaintiff by the NTSB and its ten unknown employees for its inept, corrupt and harmful and sloppy investigation of the plaintiff's accident in the first instance, published on the internet and sent directly to all of those requesters for copies of the NTSB report.

b. A modification of the NTSB report withdrawing the false, misleading and deceptive contributions by AlliedSignal and Honeywell.

c. An admonition and warning to defendants AlliedSignal and Honeywell, together with the imposition of a fine and sanctions for deliberately, willfully, wrongfully misleading the NTSB in the conduct of its investigation.

d. A correction to the NTSB by personnel of defendants AlliedSignal and Honeywell disclosing for the first time to that agency of Government

that the actual functioning of the amplifier and amplifier half ball in the operation of the engine in the plaintiff's aircraft, such to become a permanent part of the NTSB Factual Report and Brief of Accident and Probable Cause Determination.

e. A complete abject profound written apology by AlliedSignal and Honeywell, published on the Internet and sent to all requesters, as well as aviation publications to the effect that they deliberately misled the NTSB in response to questions concerning the operation of the fuel control in the plaintiff's engine.

f. An undertaking, with appropriate sanctions applied, that in future NTSB investigations the defendants will willingly, honestly and accurately comply with the regulations applicable to a party to an investigation, and will not, as has previously consistently been the case, act as an aid for the product integrity department (an euphemism for the legal support department) and for insurers of the defendants.

g. An order directing the NTSB and its employees to comply with the Constitution of the United States, in particular the Fifth Amendment, and to follow its

normal, regular and routine policy of adopting the probable cause determination as recommended by the second team of investigators of the plaintiff's accidents.

i. An order directing that the NTSB implement procedures to avoid a repetition of the circumstances leading to this lawsuit.

h. Such other relief as this Court may deem warranted under the circumstances.

Arthur Alan Wolk, Esquire
WOLK & GENTER
1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220
Attorney for Plaintiff, *pro se*